No. 86-6169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM WAYNE THOMPSON, *Petitioner,*

v.

STATE OF OKLAHOMA, *Respondent.*

On Writ Of Certiorari To The Court Of Criminal Appeals Of The State Of Oklahoma

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BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I

In a capital case against a sixteen year old defendant, the trial court admitted into evidence two gruesome photographs of the murder victim. The Court of Appeals stated that admitting the "ghastly, color" photographs into evidence was error that served no purpose other than to inflame the jury, but found that the error was harmless because evidence of the defendant's guilt was so strong. The first question presented is:

May the admission of inflammatory evidence in a capital case against a sixteen year old defendant be deemed harmless error merely because of strong evidence of guilt, when such evidence also prejudices the defendant's right to fair, full jury consideration of all mitigating circumstances—including age—during death penalty deliberations?

II

The second question presented is:

Whether the infliction of the death penalty on an individual who was a child of fifteen at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution of the United States?

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals is published as *Thompson* v. *State* at 724 P.2d 780. The opinion is reproduced in the Joint Appendix.

Although there is no formal or reported trial court opinion, the Judgment and Sentence on Conviction filed in the District Court of Grady County is set forth in the Joint Appendix. [JA 34-35, R. 512]

Also, set forth in the Joint Appendix is the Certification Order, in which the District Court of Grady County decided to hold petitioner accountable as if he were an adult under 10 Okla. Stat. § 1112 [JA 5-8], and the Order of the Oklahoma Court of Criminal Appeals Affirming Certification. [JA 32-33, R. 510-11].

JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 U.S.C. § 1257(3). The opinion of the Court of Criminal Appeals was entered on August 29, 1986. The Court of Criminal Appeals denied a timely petition for rehearing on September 24, 1986. On November 18, 1986, Mr. Justice White entered an order extending the time for petitioning for a writ of certiorari up to and including December 23, 1986. This Court granted the petition for writ of certiorari on February 23, 1987.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const., Amend. XIV (excerpt):

> "No State shall . . . deprive any person of life . . . without due process of law . . ."

STATEMENT OF CASE

William Wayne Thompson was convicted and sentenced to die for a murder committed while he was still fifteen years of age and a child under the laws of Oklahoma.

Certification Proceedings

In 10 Okla. Stat. § 1101, the term "child" is defined as "any person under the age of eighteen (18) years, except any person sixteen (16) or seventeen (17) years of age who is charged with murder" and certain other specified offenses.[1] A person who is sixteen or seventeen and who is charged with murder is automatically considered to be adult, unless the person successfully moves to be certified as a child. 10 Okla. Stat. § 1104.2. This "automatic" certification was *not* the basis for trying the defendant in this case in criminal court.

In this case, the trial court decided to hold Wayne Thompson accountable in criminal proceedings "as if he were an adult" under a separate statute. 10 Okla. Stat. § 1112(b). This statute allows a child of any age who is charged with an offense that would be a felony if committed by an adult to be tried in criminal court if (i) the state can establish "the prosecutive merit" of the case, and (ii) if the court certifies "that such child shall be held accountable for its [sic] acts as if he were an adult." This certification may occur only after the court has examined whether there are "prospects for reasonable rehabilitation of the child within the juvenile system."

The state initiated a proceeding pursuant to 10 Okla. Stat. § 1112(b). Petition for Delinquency and Accountability, Case No. JFJ-83-12. [JA 3-4][2] The petition asked, in part, that the District Court find that the boy was "competent and had the mental capacity to know and appreciate the wrongfulness of his . . . act." [JA 4].

After a hearing on whether the case had prosecutive merit on March 29, 1983, the District Court found probable cause to believe that the defendant had committed first degree murder.

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[1] Pertinent statutes, including 10 Okla. Stat. § 1101, are included in Appendix A to this brief.

[2] References to the Record on Appeal are designated [R. ____]. Citations to the transcript of the petitioner's trial are designated [Tr. ____]. References to the Joint Appendix are [JA ____].

On April 21, 1983, the District Court held an "amenability" hearing. On the same day as this hearing, the District Court filed a Certification Order. [JA 5-8] The court found:

> (i) The boy was accused of "a very serious offense to the community" that had been "committed in an aggressive, violent, premeditated and willful manner." [JA 5]
>
> (ii) The alleged offense was against a person. [JA 5]
>
> (iii) The boy did not have a high I.Q., but he "knows right from wrong and understands the consequences of his actions and . . . he just doesn't care." The boy "has the sophistication and maturity necessary to understand and appreciate the wrongful nature of his actions." [JA 6]
>
> (iv) The boy's record included nine prior arrests. He had previously received counseling and had once been adjudicated a delinquent child, before being placed on probation. [JA 6]
>
> (v) "This juvenile is not amenable to any rehabilitation efforts as long as he remains in the juvenile justice system." This finding was based, in part, on testimony of witnesses from the Oklahoma Department of Human Services, who "could offer no possible placement within the Department with any services that hold out any reasonable prospect for rehabilitation of this juvenile." [JA 6-7]
>
> (vi) The offense did not occur while the juvenile was escaping from an institution for delinquent children. [JA 7]

On the basis of these findings, the trial court decided that William Wayne Thompson should be held accountable for his acts "as if he were an adult." *Id.*

Trial

Wayne Thompson was tried between December 4 and December 9, 1983 in the District Court of Grady County, Oklahoma for the murder of Charles Keene. [JA 1-2]

A. Evidence Of Motive

The only apparent motive for Keene's murder, according to evidence presented by both prosecution and defense, was the

Thompson-Mann family's anger over Keene's repeated abuse of his former wife, Vicky Keene, sister of defendants Anthony Mann and Wayne Thompson.

On the afternoon of January 22, Anthony Mann, Danny Mann, and Vicky Keene visited Charles Keene at his former wife's trailer in order "to talk some sense into Charles." In Mrs. Keene's words, they were "trying to talk him into leaving . . . [to] get out of our lives." They had no success. [Tr. 588-89, 715] According to testimony of Mrs. Keene and Danny Mann, Charles Keene was "messed up" from paint sniffing. [Tr. 588, 716] When Vicky Keene asked Charles Keene for her car keys so that he could not take her car away, [Tr. 589] Charles said the keys were in the car.

While Mrs. Keene looked, in Danny Mann's words, "we said 'Charles, you're going to give us the keys or we're going to get them from you.' So we started kind of easing forward toward him . . ." [Tr. 717] Keene grabbed a knife, which Anthony Mann knocked from his hand. [Tr. 717] The two men grabbed Keene, held and searched him, took the car keys and were leaving when Keene again picked up the knife and tried to stab Danny Mann. [Tr. 717] Mrs. Keene observed her brothers running out of the trailer. She also saw Keene, butcher knife in hand, before he closed the trailer door. [Tr. 589-90] The Manns and Mrs. Keene then reported the incident to the local sheriff, but they were told that nothing could be done. [Tr. 590]

The trailer incident was one of many episodes in a violent and tragic matrimonial conflict between the Keenes. The two were married for seven years, but had been divorced approximately two years before Keene's death. When called as a prosecution witness at the defendant's trial, Mrs. Keene stated that being married to and living with Charles was a nightmare. [Tr. 610] Despite the divorce and despite her wishes, he often stayed in his ex-wife's home.[3] When she "would call the law out there[,]

[3] Mrs. Keene admitted that she deliberately had a child by her ex-husband. She stated that she wanted a child, but that she felt fearful if she had a child by another man. [Tr. 591]

Mrs. Keene supported her family without Keene's help [Tr. 601, 610]; he had not worked for the last three or four years prior to his death. [Tr. 610] Aggravating the conflict, Keene had taken their six year old child to Texas. She moved to Texas to try to get the child back. [Tr. 613]

they wouldn't do nothing" about Keene's presence. [Tr. 591; *see also* Tr. 622-23] Mrs. Keene said that Keene had beaten her many times [Tr. 611] and had shot at her. [Tr. 611][4]

Wayne Thompson did not testify at his trial, but the record suggests additional reasons for his rage at Keene. According to the report of Dr. Helen Klein, a clinical psychologist who testified for the prosecution, the boy "described Charles Keene, his deceased brother-in-law, as an 'unemployed glue sniffer,' who 'beat up on me all the time . . . when I was younger he kicked me.'" [R.488] Keene also started the boy "sniffing" paint. [Tr. 612, 694-95]

B. The Murder Of Charles Keene

On the evening of January 22, Anthony Mann (age twenty-seven), Richard Jones (age twenty-four), Bobby Joe Glass (age nineteen) and Thompson left the home of Dorothy Thompson, the boy's mother. [Tr. 631-32] Before leaving, Thompson told his girl friend that "we're going to kill Charles." [Tr. 685]

In the early morning of January 23, Malcolm "Possum" Brown and his wife, Lucille, were awakened in their home by the sound of a gunshot. [Tr. 469, 484, 494] Then, someone pounded on their front door shouting: "Possum, open the door, let me in. They're going to kill me." [Tr. 469, 494] Brown went to the front door, looked out, and saw four men beating another man. [Tr. 471, 474] Brown also heard one of the assailants say, "[t]his is for the way you treated our sister." [Tr. 475-76] While

[4] As a result, Anthony Mann had given her his gun for her protection. After the incident on the afternoon of January 22, she bought shells for the gun. [Tr. 600] The gun and shells were used that night to kill Keene.

Brown spoke with police on the telphone, the men took the victim away in a car. [Tr. 477, 498]

Several hours after leaving home, Thompson and the three men returned to Dorothy Thompson's house. [Tr. 686] The boy was wet from the chest down. He was visibly shaken and was crying. [Tr. 568, 686-87] Charlotte Mann, the former wife of Anthony Mann, observed him at this time. The boy's mother was hugging him and trying to calm him. In Mann's words, "he told Dorothy [his mother] that he killed him. Charles was dead and Vicky didn't have to worry about him anymore." [Tr. 568] He told his girl friend that they had killed Keene and thrown his body into the river. [Tr. 687-88] Later, apparently after the boy had changed clothes, he was still upset and crying. [Tr. 511-12]

At trial, the prosecution introduced evidence of other fragmentary accounts of the crime. [Tr. 508-512, 521-25, 567-68, 574-76, 634-35] According to Mann's statements to his ex-wife, Charlotte, "they went . . . to Vicky's house and got Charles and they went in and told him to pack his suitcase[,] that they were taking him to the highway because he was leaving. . . . Charles left with them and they ended up at Possum Brown's house and Charles got out and ran and they chased him . . ." [Tr. 574; *see also* Tr. 522] The gun went off during Keene's attempt to escape, but Keene was not shot at the Browns'. [Tr. 522, 574-75] After the beating described by the Browns, the four took Keene to another location on the Washita River. [Tr. 574-75] There, Keene was shot twice—once by Thompson, once by Glass. [Tr. 521-22, 574-75] Afterwards, according to Glass' admissions, Thompson cut Keene "so the fish could eat his body." [Tr. 521] Jones and Thompson then threw Keene's body into the river. [Tr. 522]

C. Photographs And Medical Evidence

Dr. Fred Jordon, chief medical examiner for Oklahoma, testified that the victim had been beaten, shot twice and that his throat, chest and abdomen had been cut. [Tr. 661-62, 667-69]

In addition to the medical examiner's testimony, the court overruled defense objections and allowed introduction of two

color photographs of the victim's remains, which had been in the Washita River for almost one month. [Tr. 627-30] Indeed, during the prosecution's opening statement, the district attorney gave the jury a preview of what they would see:

> You're going to see photographs and you're going to see pictures of the entire recovery scene. You're going to see Charles Keene as he's pulled out of that river. He's covered with mud. You're going to see the officers and Dr. Crowell who was the initial medical examiner there on the shore of the Washita. He'll tell you . . . [t]hat Charles Keene had what appeared to be a larva type substance, maggots, larva coming out of his body.

[Tr. 362]

D. Penalty Phase

In the sentencing phase, the State sought a death penalty based on two alleged aggravating circumstances:

> (1) "The murder was especially heinous, atrocious or cruel"; and
>
> (2) "The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." [JA 12, R. 88]

1. Prosecutor's Use Of Photographs

In an opening statement during the penalty phase, the prosecuting attorney said that the State would rely upon evidence introduced during the guilt phase to show that the murder was especially heinous, atrocious and cruel. [Tr. 774-75] Thus, the color photographs of the victim's remains were also presented to the jury during the penalty phase of trial.

Since the jury had not requested to see the photographs while deliberating on guilt, the prosecutor complained in closing argument during the penalty phase:

> [T]here is something in this case that I want to tell you in the very beginning, I did not show you the photographs, you did not ask that the photographs of Charles Keene, the physical evidence be produced to you upstairs in the jury

> room in the first phase of this trial. I didn't, but you've got to ask for these exhibits to have them brought up to that jury room.

[Tr. 848] Later, the prosecutor placed the photographs on the podium in front of the jury and for five or ten minutes waved them in front of the jurors. [Tr. 857] The judge overruled the defense counsel's objection, but warned the prosecutor to stop waving the pictures in front of the jury. After a detailed and graphic description of the crime with the aid of the inflammatory photographs, the prosecutor closed: "Its not the sixteen year old, folks, that can do that." [Tr. 865]

2. State's Evidence And Argument To Show Probability Of Future Acts Of Violence

In its attempt to show that the boy would commit more violent acts, the state relied on evidence of his reputation in the community, his arrest record his failure in one juvenile rehabilitation program, and the opinion of Dr. Helen Klein, a clinical psychologist. After summarizing the boy's arrest record, Klein characterized him as "physically aggressive" and "a bully, an anti-social person." [Tr. 780] She expressed her view that the boy "will . . . become a hardened criminal" and "will become more violent" if he just goes to prison. [Tr. 783-84][5]

A far different description of the boy had emerged from Dr. Klein's psychological report, which was apparently used by the District Court during certification proceedings. [JA 6, 7] The trial judge attached it to his sentencing report. [R. 487-91]

> During the initial stage of the interview, he attempted to portray himself as macho, tough and cavalier. This facade

[5] Apparently, Dr. Klein's pessimism was based, at least in part, on her assessment of Oklahoma prisons. On cross-examination, Dr. Klein responded to defense counsel's suggestion that "every modern prison" gives psychological help to inmates. She responded: "I'd have to know how you define a modern prison. I know that in the State of Oklahoma there is very little psychological services available, or psychiatric for that matter." [Tr. 784]

> tended to dissipate as his anxiety abated.
>
> * * *
>
> Wayne is the sixth of eight children, his father is a truck driver and his mother a housewife. Wayne said he was in special education classes and had entered the 10th grade before dropping out of school in the fall of 1982. Wayne said he had sniffed paint for approximately seven months last year, but quit of his own volition.
>
> * * *
>
> Individuals who obtain MMPI [Minnesota Multiphasic Personality Inventory] profiles similar to Wayne's typically are described as hyperactive, restless and indecisive, and as persons who may keep people at a distance (emotional alienation) and show poor social judgment. A profile such as that obtained by Wayne must be interpreted with caution as it suggests the possible effect of a response set which may have led to exaggeration or distortion of his current status. Such a profile reveals the possible presence of a desire to appear independent of social ties and to "fake bad," i.e., to exaggerate symptomatology.
>
> Rorschach test data support the MMPI data in that test results are indicative of a person whose entire focus is external. He is excitable, hostile, and is responsive to the external world to the extent he cannot organize his inner experience. He has a stereotypical, concrete view of the world and demonstrates little ability to organize or to conceptualize his experience beyond that. Wayne does not have enough ego to handle or to control his impulses and therefore tends to act them out.

[R. 487-91]

E. Jury Instructions

While deliberating over whether the defendant was guilty, the jury had sent the judge a note which asked: "Has the Defendant been certified as an adult?" The trial court answered "[y]es," without distinguishing between the question asked by the jury—whether the boy had "been certified as an adult"—and the actual certification order, which provided only that he should be held accountable "*as if* he were an adult." (Emphasis supplied) [JA 16]

In the penalty phase, after the jury was instructed that it could not fix the defendant's punishment at death unless it first found that one or more aggravating factors was present, [JA 22] the trial judge discussed mitigating circumstances. Instruction No. 7 stated:

> Mitigating circumstances are those which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case.

[JA 23] Instruction No. 8 then reminded the jury that "[e]vidence has been offered as to . . . [t]he existence of youthfulness of the defendant." [JA 24] The trial court's jury instructions during the penalty phase did not state that the defendant's age was a mitigating factor.

After the jury started deliberations in the penalty phase, it sent a question to the trial judge: "Please define mitigating." The answer of the judge was: "You have your instructions, please continue deliberation." [JA 28, Tr. 866] Later, the jury sent a second note asking whether defendant would be eligible for parole if sentenced to life imprisonment. The judge answered: "That is an executive decision, not judicial. You have your instructions." [JA 29, Tr. 866-67]

F. The Death Sentence

The jury fixed defendant's sentence at death on the basis of a single aggravating circumstance—that the crime was "especially heinous, atrocious or cruel." The jury was unpersuaded by the prosecutor's arguments that the boy could not be rehabilitated. It declined to accept the prosecutor's additional claim that the boy would commit violent criminal acts in the future. [JA 30, Tr. 870]

Order Of The Court Of Criminal Appeals Affirming Certification

The Court of Criminal Appeals affirmed the certification of this boy to stand trial as if he were an adult on January 13, over one month after his conviction and death sentence. [JA 32-33]

The Judgment Of The Court Of Criminal Appeals Of Oklahoma

The Court of Criminal Appeals affirmed the judgment and sentence. The admission of the "ghastly, color photographs with so little probative value" was found to be harmless error because evidence of the boy's guilt was "so strong." 724 P.2d at 782-83.

The Court of Criminal Appeals briefly addressed the defendant's argument "that the execution of William Wayne Thompson, who was fifteen at the time of the offense, would constitute cruel and/or unusual punishment." *Id.* at 784. The entirety of the appellate court's discussion of this important and complex issue is as follows:

> The same arguments now made by appellant were made by appellate counsel in *Eddings* v. *State*, 616 P.2d 1159 (Okl. Cr. 1980). This Court, unanimously rejecting the arguments, found that imposition of the death penalty on a minor certified to stand trial as an adult constitutes neither cruel nor unusual punishment. . . .
>
> The United States Supreme Court granted certiorari on the issue, . . . but then decided the case on another ground. *Eddings* v. *Oklahoma*[.] Upon reconsideration of the issue, we reaffirm our previous holding that once a minor is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult.

Id. (citations omitted).

SUMMARY OF ARGUMENT

I

Although the traditions of Anglo-American jurisprudence allow capital punishment in many cases, imposing the death sentence for a crime committed by a fifteen year old boy, a child under state law, violates the Eighth and Fourteenth Amendments.

Condemning a child or adolescent to death serves no legitimate penological purpose. No evidence suggests that the remote prospect of a death sentence for a child or adolescent is

a greater deterrent than long-term imprisonment. Even an improbable death penalty may attract a few self-destructive or death-defying juveniles to commit capital crimes. Furthermore, imprisonment is more than adequate retribution and incapacitation for the crime of a fifteen year old. Of course, a sentence of death also denies a child or adolescent the right to life, the chance to grow, and all possibility of rehabilitation.

The death penalty for a fifteen year old violates contemporary standards of decency. Juvenile executions have always been rare. In part, this fact reflects the long-standing view that children must be treated and judged differently. The explanations for this special treatment are many and persuasive. Children are less mature, more impulsive, and more self-destructive. The harshest punishments are not appropriate for transgressing children and adolescents, whose crimes are often the result of victimization, abuse, and neglect. And so, even criminal law reflects the understanding that "'[c]hildren have a very special place in life.'" *Eddings* v. *Oklahoma*, 455 U.S. 104, 116 n. 12 (1982) (quoting *May* v. *Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)). The law is tenacious in its belief that children and adolescents are less responsible for their actions and in its hope that offending children will be rehabilitated. This Court has held consistently that even youthful offenders who commit capital crimes deserve the special consideration required by this tradition.

An increasing number of states have established minimum ages for imposition of capital punishment. No state that has decided to establish an explicit minimum age by statute has selected an age younger than sixteen. Likewise, contemporary jury sentencing patterns reflect an extreme reluctance to sentence children to death, even when authorized by law. To paraphrase Justice Stewart, in this era death sentences for juveniles are cruel and unusual in the same way that being struck by lightning is cruel and unusual. *Furman* v. *Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

The State of Oklahoma, however, is uncommonly reluctant to respect these principles when an adolescent is accused of an

intentional homicide and a prosecuting attorney asks for the death penalty. Oklahoma neither prohibits the capital punishment of children below a certain age nor establishes procedures to assure that the "relevant mitigating factor" of youth, *Eddings*, 455 U.S. at 116, is carefully considered prior to a death sentence.

Oklahoma's disregard of children's "very special place" in a death penalty scheme is tragically evident in the instant case. First, the court certifying Wayne Thompson to stand trial as if he were an adult did not assess his moral guilt in light of the mitigating factor of age. The emphasis in the certification process was on the seriousness of the allegations, the boy's sanity, and the capabilities of Oklahoma's juvenile system, not the boy's character and personal culpability for the murder. Second, the reliability of the jury's decision to sentence the boy to die was undermined by illegitimate prosecutorial tactics designed to distract the jury from its duty to consider carefully the mitigating factor of youth, and by jury instructions that failed to inform the jury that youth was a mitigating factor of great weight. Indeed, the jury was instructed erroneously that the boy had been certified to *be* an adult and that the jurors were free to decide for themselves what might be considered as a mitigating factor.

In sum, this Court has consistently adhered to the principle that the age of the defendant "bear[s] directly on the fundamental justice of imposing capital punishment." *Skipper* v. *South Carolina*, ___ U.S. ___, 106 S.Ct. 1669, 1676 (1986) (Powell, J., joined by Burger, C.J. and Rehnquist, J., concurring). Because Oklahoma continues to disregard this elemental principle of justice for the young, this Court must vacate the death sentence in this case.

II

By placing extraordinary emphasis upon gruesome photographs of the victim during the sentencing phase of the boy's trial, the prosecutor so riveted the jury's attention to the method of the murder and the effects of post-mortem decay

that he effectively distracted the jury from giving fair, full consideration to the youth and the character of the boy. As a result, there is a great and intolerable danger that the death sentence was imposed without "constitutionally indispensable," "particularized consideration," *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976), of the boy's youth, character and record.

Although the Oklahoma Court of Criminal Appeals was required by statute to decide whether the death sentence was the result of passion or prejudice, the court did not even consider the effect of inflammatory, gruesome photographs of the murder victim's remains used repeatedly by the prosecutor during the sentencing phase. The appellate court condemned the prosecutor's actions and held that the trial court's decision to allow the inflammatory evidence was error. Still, the appellate court upheld the defendant's conviction and death sentence, without considering how the error clearly prejudiced the boy's right to a reliable sentencing determination.

III

As this case demonstrates, the tradition of special treatment of child offenders can be difficult to maintain. Juries influenced by emotion, improper prosecutorial conduct, and the intrinsically appalling nature of murder occasionally fail to give fair, full consideration to the mitigating factor of age. This Court must protect even children who have committed capital crimes from a death penalty all too easily and yet freakishly imposed.

ARGUMENT

I

THE EXECUTION OF A PERSON WHO WAS A CHILD OF FIFTEEN AT THE TIME OF THE CRIME IS CRUEL AND UNUSUAL PUNISHMENT.

Wayne Thompson's death sentence offends the Eighth and Fourteenth Amendments because his execution would be cruel and unusual punishment. There are broad and narrow grounds

for this conclusion, but the common feature of petitioner's Eighth Amendment arguments is his youth.

First, the death sentence was imposed for a crime committed when the boy was fifteen years of age. The death sentence is unconstitutional for this reason alone. As the Court has explained, a punishment is cruel and unusual if:

(i) "[I]t . . . makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering," *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion of White, J.); or

(ii) The punishment "is grossly out of proportion to the severity of the crime," *id.*, or the individual's personal, "moral guilt" for that crime, *Enmund* v. *Florida*, 458 U.S. 782, 800 (1982).

The application of the Eighth Amendment ultimately requires this Court to render its own judgment, *id.* at 797, but its decision "should be informed by objective factors to the maximum possible extent." *Id.* at 788 (quoting *Coker*, 433 U.S. at 592 (plurality opinion of White, J.)). Thus, when this Court examines whether a punishment is excessive or harsh in light of society's "evolving standards of decency," *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), it looks to such factors as history and precedent, legislative judgments, international opinion and juries' sentencing decisions. *Enmund*, 458 U.S. at 788.

Wayne Thompson's death sentence also offends the Eighth Amendment on narrower grounds. When examining whether punishment of a particular individual violates the Eighth Amendment, this Court insists that a death sentence be based on a careful assessment of moral guilt. "While the States generally have wide discretion in deciding how much retribution to exact in a given case, the death penalty, 'unique in its severity and irrevocability,' . . . requires the State to inquire into the relevant facets of 'the character and record of the individual offender.'" *Tison* v. *Arizona*, ___ U.S. ___, 55 U.S.L.W.

4496, 4499 (Apr. 21, 1987) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 187 (1976) and *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976)). Oklahoma did not fulfill this constitutional duty to assess carefully moral guilt in light of mitigating factors, particularly the boy's youth.

A. Condemnation Of Children Makes No Measurable Contribution to Legitimate Goals Of Punishment.

"There must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death." *Spaziano* v. *Florida*, 468 U.S. 447, 460 n.7 (1984). In general, the state may punish offenders to achieve one or more of four objectives:

> (1) [T]o rehabilitate the offender; (2) to incapacitate him from committing offenses in the future; (3) to deter others from committing offenses; or (4) to assuage the victim's or the community's desire for revenge or retribution.

Spaziano v. *Florida*, 468 U.S. at 477-78 (Stevens, J., dissenting). *See also, e.g., Gregg* v. *Georgia*, 428 U.S. at 183 (Stewart, J., plurality opinion).

1. Retribution Is Not A Valid Penological Goal For The Execution Of Children And Adolescents.

As this Court stated in *Spaziano* v. *Florida*, 468 U.S. 447, 462 (1984): "[R]etribution clearly plays a more prominent role in a capital case." Retribution is a legitimate goal of the state because there is a societal need for "particularly offensive conduct" to be met with the punishment that it "deserves." *Gregg* v. *Georgia*, 428 U.S. at 183 (plurality opinion). "The instinct for retribution is part of the nature of man." *Furman* v. *Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring). However, retribution justifies an execution only if a defendant's culpability is of the highest degree. "[I]n the final analysis, capital punishment rests on not a legal but an ethical judgment—an assessment of what we called in *Enmund* the 'moral guilt' of the defendant." *Spaziano* v. *Florida*, 468 U.S. at 481

(Stevens, J., dissenting) (citing *Enmund*, 458 U.S. at 800-01). *See also Tison* v. *Arizona*, 55 U.S.L.W. at 4499-50.

Although the execution of an adult for retribution is constitutionally permissible, this justification for the death penalty loses all legitimacy when the object of capital punishment is a child or adolescent. Juveniles do not "deserve" the harshest punishments in the same way that mature, responsible adults might. Those who kill are not held personally responsible for murder unless they are deemed to have the capacity to function as moral beings, who can evaluate their behavior in light of socially accepted values. Only those who are deemed to act out of a fully developed moral awareness, and who choose to act at odds with morality, are deemed "deserving" of the full measure of punishment allowed by law. *See Enmund*, 458 U.S. at 800-01.

Adolescents are not yet fully operational moral beings even though the capacity to form moral standards to guide behavior begins to emerge in adolescence. "[L]arge groups of moral concepts and ways of thought only attain meaning at successively advanced ages and require the extensive background of social experience and cognitive growth represented by the age factor." Kohlberg, *The Development of Children's Orientations Toward a Moral Order*, 6 Vita humana 11, 30 (1963). While struggling to establish their own identity, adolescents are still significantly dependent upon their parents for support and approval. E. Erickson, *Childhood and Society* 261-63 (2d ed. 1963). *See generally* E. Erickson, *Identity: Youth and Crisis* (1968); P. Mussen, J. Conger & J. Kagan, *Child Development and Personality* (5th ed. 1979). Like younger children, adolescents are so profoundly dependent upon their parents and families to define morally appropriate boundaries for their behavior, D. Offer & J. Offer, *From teenage to young manhood: A psychological study* (1975), that they cannot be regarded as morally culpable for homicidal behavior to the same degree as adults. Adolescents are also susceptible to the suggestions of others—particularly peers. E. Erickson, *Childhood and Society* 261-63 (2d ed. 1963). Adolescence is a

period characterized by impulsive, thoughtless behavior often evoked by strong emotion. Indeed, the only psychological evidence in the record—prepared by the state's witness, Dr. Helen Klein—portrays Wayne Thompson as "hyperactive," "restless," "desir[ing] to appear independent of social ties and to 'fake bad,'" "responsive to the external world," unable "to organize his inner experience," and lacking "ego . . . to control his impulses." [R. 487-91] This portrait of a troubled boy could be that of many other adolescents. It is also far different than the image drawn by the prosecutor, who was so intent on denying the reality and meaning of Wayne Thompson's youth.

Thus, the emerging ability of adolescents to act out of a fully developed moral awareness is continually under assault. Adolescents' crimes are more often the products of powerful desires to please others or of sudden strong impulses; these crimes are less likely to be the result of coldly deliberate, thoughtful decisions to violate the known moral precepts of society.[6] For these reasons, adolescents do not deserve death as punishment: They simply are not personally responsible for their homicidal behavior in the sense that *Enmund* and *Tison* require. Children and adolescents by their nature deserve understanding and treatment—or at least the chance to grow—rather than the revenge of an outraged society anxious to "kill them back."

2. The Remote Possibility Of Dying For A Crime Is Not Likely To Deter A Young Offender, If The More Likely Prospect Of Long Term Imprisonment Has Already Failed As A Deterrent.

As this Court indicated in *Gregg* v. *Georgia*, evidence that the prospect of capital punishment deters capital crimes is

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[6] On the characteristics and background of homicidal adolescents, see generally Cornell, Benedek & Benedek, *Characteristics of Adolescents Charged with Homocide: Review of 72 Cases*, 5 Behavioral Sciences & the Law 11 (1987); C. Keith (ed.), *The Aggressive Adolescent: Clinical Perspectives* (1984); M. Rutter & H. Giller, *Juvenile Delinquency: Trends and Perspectives* (1983).

inconclusive. Writing for the plurality, Justice Stewart found "no convincing empirical evidence either supporting or refuting this view." 428 U.S. at 185. Nevertheless, he wrote:

> We may . . . assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.

Id. at 185-86 (Stewart, J., plurality opinion). Of course, deterrence is logical, but logic only works for those cold, calculating individuals who do not act out of passion or impulse. Adolescents are particularly unlikely to fit this category. They are going through "the period of great instability which the crisis of adolescence produces." *Haley* v. *Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion). Juveniles "generally are less mature and responsible than adults." *Eddings* v. *Oklahoma*, 455 U.S. at 115-16 (footnote omitted). Adolescents tend to "live for today" with little thought of the future consequences of their actions. *See, e.g.*, Kastenbaum, "Time and Death in Adolescence," in *The Meaning of Death* 99 (H. Feifel ed. 1959). "'[A]dolescents may have less capacity to control their conduct and to think in long range terms than adults.'" *Eddings*, 455 U.S. at 115 n. 11 (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 7 (1978)). Adolescents are in a developmental stage when defiance of danger and death is often not controlled by a sense of mortality. The young are attracted to—not deterred from—flirtations with death because of an immature feeling of omnipotence. Fredlund, *Children and Death from the School Setting Viewpoint*, 47 J. School Health 533 (1977); Miller, "Adolescent Suicide: Etiology and Treatment," in 9 *Adolescent Psychiatry* 327 (S. Feinstein, J. Looney, A. Schwartzberg & A. Sorosky eds. 1981). One of the problems with juvenile behavior is not that the juveniles are cold, calculating and careful in these judgments; it is that they have no judgment at

all, *Parham* v. *J.R.*, 442 U.S. 584, 603 (1979), at least in the sense of considering the consequence of their behavior and deciding to proceed nevertheless. Irwin & Millstein, *Biopsychological Correlates of Risk-Taking Behaviors during Adolescence*, 7 J. of Adolescent Health Care 82S (Nov. 1986 Supp.). This absence of judgment derives from the adolescents' limited experience and lack of ability to calculate future consequences. The results are often tragic: Alcohol and drug abuse, reckless driving, sexual experimentation, and other self-destructive conduct. *Id.* "[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti* v. *Baird*, 443 U.S. 622, 635 (1979) (plurality opinion).

This generally accepted view of typical adolescent behavior leads to the conclusion that juveniles do not commonly engage in any "cold calculus that precedes the decision to act." *Gregg* v. *Georgia*, 428 U.S. at 186 (Stewart, J., plurality opinion). Thus, this Court's premises underlying an assumed general deterrence of the death penalty do not apply in any reasonable manner to adolescents.

3. The Capacity Of The Young For Change, Growth And Rehabilitation Makes The Death Penalty Particularly Harsh And Inappropriate.

The death penalty totally rejects the one sentencing goal normally thought most appropriate for young offenders—rehabilitation. *See, e.g.*, *People* v. *Hiemel*, 49 A.D.2d 769, 770, 372 N.Y.S.2d 730, 731 (1975). Execution abandons and denies the promise of adolescence—that the impulsive, antisocial acts of teenagers will naturally moderate as they become adults. Killing children and adolescents for their crimes offends the fundamental premises of juvenile justice:

> [I]ncorrigibility is inconsistent with youth; . . . it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life.

Workman v. *Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968).

Likewise, the goal of incapacitation or specific deterrence does not justify capital punishment of juvenile offenders. Unlike deterrence and retribution, "incapacitation has never been embraced as a sufficient justification for the death penalty." *Spaziano* v. *Florida*, 468 U.S. at 461. Long-term imprisonment of young offenders affords society comparable protection against their possible future crimes.

Juvenile murderers tend to be model prisoners and have very low rates of recidivism when released. D. Hamperian, *The Violent Few* 52 (1978); T. Sellin, *The Death Penalty* 102-20 (1982). *Cf.* Vitello, *Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent* v. *United States*, 26 DePaul L.Rev. 23, 32-34 (1976).

Moreover, as adolescents grow into adults, they generally leave behind criminality. F. Zimring, "Background Paper," in Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 37 (1978). Crime statistics reveal that as people move from the turbulence of adolescence to the calmer period of the early twenties, they commit fewer crimes, whether or not they are apprehended or participated in a rehabilitation program. *See* Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Assessing the Relationship of Adult Criminal Careers to Juvenile Careers: A Summary* 4 (1982); President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 55-56 (1967). *Cf.* Federal Bureau of Investigation, U.S. Dept. of Justice, *Crime in the United States: 1978* 194-96 (1979); Zimring, "American Youth Violence: Issues and Trends" in *Crime and Justice: An Annual Review of Research* 67 (Morris & Tonry eds. 1979) (rates of many kinds of criminality peak in mid-adolescence).

The character development which continues to take place during adolescence, until eighteen years of age, can very well overcome features of an antisocial personality that appear during adolescence. For this reason, the diagnosis of Antisocial

Personality Disorder cannot be made until a person has reached eighteen years of age.

> Since [the typical childhood signs of Antisocial Personality Disorder] may terminate spontaneously . . . , a diagnosis of Antisocial Personality Disorder should not be made in children; it is reserved for adults (18 or over), who have had time to show the full longitudinal pattern.

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 319 (3d ed. 1980). *See also* Wilson & Herrnstein, *Crime and Human Nature* 144-45 (1985).

B. Condemning Any Fifteen Year Old Child To Death Violates Contemporary Standards Of Decency.

The meaning of the Eighth Amendment's prohibition of cruel and unusual punishment must be drawn "from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. at 101 (plurality opinion). *See also Robinson* v. *California*, 370 U.S. 660, 666 (1962). The application of this test requires that the Court look to objective factors such as history, legislative judgments, international opinion, and juries' sentencing decisions. *Enmund* v. *Florida*, 458 U.S. at 788-89.

1. Special Treatment Of Children And Adolescents Is An Important Part Of American Traditions Of Justice.

"Children have a very special place in life which law should reflect." *May* v. *Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring) *quoted in Eddings* v. *Oklahoma*, 455 U.S. at 116 n. 12. Examples of society's decision to treat children differently include limitations on youths' right to vote, contract, sue or be sued, dispose of property by will, marry, accept employment, purchase liquor and drive vehicles. F. Zimring, *The Changing Legal World of Adolescence* (1982).[7]

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[7] A collection of pertinent examples of Oklahoma statutes that disable juveniles from certain activities—including driving, purchasing cigarettes, resorting to pool halls or bingo parlors—is included in Appendix A to this brief.

The dominant traditions of American law provide that people generally are not fully responsible until age eighteen. This age is the most common age of majority established in American law for noncriminal purposes. For similar reasons, the Twenty-Sixth Amendment establishes the right to vote at age eighteen. It is an irony—or even an irrationality—that children and adolescents are universally considered too immature to judge the criminal responsibility of accused defendants, and thus cannot serve on juries, but they may be subjected to the supreme liability of death for their supposed "responsibility."

That juveniles are less mature and less responsible than adults is a fact that has historically been recognized by this Court. *Bellotti* v. *Baird*, 443 U.S. at 635 (plurality opinion). "Children, by definition, are not assumed to have the capacity to take care of themselves." *Schall* v. *Martin*, 467 U.S. 253, 265 (1984). As a result, the actions of adolescents "cannot be judged by the more exacting standards of maturity." *Haley* v. *Ohio*, 332 U.S. at 599 (plurality opinion).

The development of separate juvenile justice systems in every state manifested a rejection of harsh, adult punishment for the unlawful acts of children. *See Eddings*, 455 U.S. at 116 n. 12; *In Re Gault*, 387 U.S. 1, 15-16 (1967). However, the perception that youths should not be subjected to the harshest punishments was an informal premise of Anglo-American criminal justice well before the development of separate juvenile justice systems. Although statutes did not always explicitly give younger offenders benefit of more lenient punishments, the young did receive *de facto* benefits, such as shorter sentences, special incarceration facilities, community-based sanctions or outright commutation of criminal sentences. *See, e.g.*, Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 Stan. L.Rev. 1187 (1970). All states now set the jursidictional age limit for their juvenile courts no lower than age sixteen. S. Davis, *Rights of Juveniles: The Juvenile Justice System* app. B (2d ed. 1986).

This Court has explained the reasons for the law's lenient treatment of child offenders in *Eddings*.

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.
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> "Adolescents everywhere, from every walk of life, are often dangerous to themselves and to others." The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 41 (1967) "[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults." . . . Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978).

455 U.S. at 115-16 & n. 11 (footnote omitted).

Special treatment of juvenile offenders is also a reflection of the belief that the young must have time and opportunity to grow—and to escape from the disadvantages, deprivations and abuse that may account for their behavior. This special treatment derives from a prevalent, compassionate and decent sense that government must be restrained from adding undue punishment to whatever pain and handicaps have already been inflicted by fate and circumstance. This sense of restraint parallels the "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California* v. *Brown*, ___ U.S. ___, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring). *See also Eddings*, 455 U.S. at 115 n. 11 ("[Y]outh crime as such is not exclusively the offender's fault.") (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 7 (1978)).

2. The Execution Of Juveniles Violates Contemporary Standards Of Decency As Reflected In Legislative Attitudes.

Protection for juveniles under death penalty statutes has increased dramatically in the past quarter century. A 1962 Associated Press survey of legal possibilities in criminal proceedings involving children showed a much harsher legal environment. *New York Times*, Jan. 7, 1962, at 81, col. 1. Of forty-one death penalty states at that time, the minimum age for the death penalty was age seven in sixteen states, age eight in three states, age ten in three states, and ages twelve to eighteen in nineteen states.

The situation today is quite different. Currently, fifteen of thirty-six states retaining the death penalty expressly exclude youths under sixteen, seventeen or eighteen from their death penalty statutes. (Appendix B) Of these fifteen, eleven states establish a minimum age of eighteen; three states set an age seventeen limit, while one state has selected sixteen years as a minimum. No state that expressly establishes a minimum age in death penalty statutes uses an age minimum below sixteen. (Appendix B)

Since 1981, seven states have legislated minimum ages specifically for their death penalty statutes—and all selected age eighteen: Ohio (1981), Nebraska (1982), Tennessee (1984), Colorado (1985), Oregon (1985), New Jersey (1986), and Maryland (1987). Currently, several other states are considering raising the minimum age. *Should A Child Who Kills Be Killed?*, Washington Post Nat'l. Ed., Apr. 13, 1987, at 31.

Twelve other states establish a minimum age limit through either their juvenile court waiver statutes or their statutes giving concurrent or exclusive jurisdiction to criminal court for capital murders committed by offenders of a certain age or older. (Appendix B) Only this year, the Indiana legislature decided to raise their minimum age from ten to sixteen. (Appendix B) The death penalty statutes in an additional six states expressly require the sentencing body to consider, as a mitigating factor, the youth of the offender. (Appendix B)

Another fifteen jurisdictions completely prohibit the death penalty for all offenders.

Thus, forty-eight of fifty-one jurisdictions either prohibit the death penalty for all offenders (including juveniles), establish a minimum age between 16 and 18, prohibit any criminal court jurisdiction over juveniles ages 12 to 16, or require by statute juries and judges to consider youth as a factor mitigating against the death penalty.

Only three states have no legislative provisions for either establishing a minimum age for the death penalty or requiring that youthful age be considered a mitigating factor in the death sentencing decision. Only one of these three states, Oklahoma, currently has any prisoners under a death sentence for a crime committed under age eighteen.

3. An Emerging Consensus Of International Law And Opinion Rejects Juvenile Executions.

Human rights treaties are the most authoritative source of customary international law on the question of juvenile executions. Three major human rights treaties explicitly prohibit juvenile death penalties. Article 6(5) of the International Covenant on Civil and Political Rights, Annex to G.A. Res. 2200, 21 U.N. GAOR Res. Supp. (No. 16) 53, U.N. Doc. A/6316 (1966); Article 4(5) of the American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI/1.1, Doc. 65 Rev. 1 Corr. 1 (1970); and Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. Each of these treaties prohibits the death penalty for crimes committed below the minimum age of eighteen. Hartman, *"Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 Cin. L.Rev. 655 (1983) [hereinafter Hartman, *International Norms*].

The United States Government has ratified the Geneva Convention, and has signed but not yet ratified the other two conventions. However, a United Nations General Assembly

Resolution recognized that Article 6 of the International Covenant constitutes a "minimum standard" for all Member States, not only ratifying states. Hartman, *International Norms*, *supra* at 681 n. 94. This resolution was supported by the United States Government. *Id.*

Further evidence of state practice appears in the national laws of over eighty nations, including almost all western European nations. These countries have either abolished the death penalty completely or have forbidden it for certain offenses and certain offenders, such as children and adolescents. Over forty nations which retain the death penalty have statutory provisions exempting youth from capital punishment. Hartman, *International Norms*, *supra* at 666 n. 44. *See also* Amnesty International, *The Death Penalty* (1979). Since 1979 there have been more than 11,000 executions in over eighty countries, but only eight executions (0.07%) were for crimes committed while under age eighteen. Amnesty International, *The United States of America: The Death Penalty* (Feb. 1987). Three were in the United States, two in Pakistan, and one each in Bangladesh, Rwanda and Barbados. *Id.* There were also undocumented reports of juvenile executions in Iran. *Id.*

Recently, the Inter-American Commission on Human Rights (IACHR) for the Organization of American States (O.A.S.) condemned two juvenile executions in the United States in 1986. O.A.S. IACHR, Res. No. 3/87, Case No. 9647 (United States) (Mar. 27, 1987), OEA/Ser. L./V/II, 69, Doc. 17 (1987).

> The Commission finds that in the member states of the O.A.S. there is recognized a norm of *jus cogens* which prohibits the State execution of children. This norm is accepted by all the States of the inter-American system, including the United States.

Id. at para 56. The IACHR agreed with the United States that "there does not now exist a norm of customary international law establishing 18 to be the minimum age for imposition of the death penalty," *id.* at para 60, but also stated:

> [I]n light of the increasing numbers of States which are ratifying the American Convention on Human Rights and the United Nations Covenant on Political and Civil Rights, and modifying their domestic legislation in conformity with these instruments, the norm [of 18 years] is emerging.

Id.

4. Jury Sentencing Patterns Reflect Popular Reluctance To Sentence Juveniles To Death.

In the years 1982 to 1985, 1,103 death sentences were imposed by juries throughout the United States. Only twenty-nine (2.6%) of these death sentences were imposed on individuals for crimes committed while under the age of eighteen. Jury sentencing practices for fifteen year old offenders are even more striking. Of the 1,103 death sentences imposed from 1982 through 1985, only four (0.4%) have been for crimes committed when the convicted individual was age fifteen or younger. (Appendix G) During this same four year period, 1.8% (1,084 of 60,789) of adults arrested for criminal homicide in the United States received the death sentence, a small portion. A microscopically small portion, only 0.6% (29 out of 5,239), of juveniles (younger than eighteen) arrested for criminal homicide received the death penalty.

Moreover, while the number of juvenile death sentences appears to be declining in recent years, the number of adult death sentences has remained fairly constant at a rate of 250 to 300 per year. (Appendix G) The decline is revealed by the changing populations on death row. As Appendix E indicates, thirty-eight (2.9%) of the 1,289 persons on death row on December 31, 1983, were under juvenile death sentences. During the next three years and three months the total death row population increased by 585 persons but the number of juveniles actually decreased by six. On March 31, 1987, only thirty-two (1.7%) of the 1,874 persons on death row had committed their crimes while under age eighteen. (Appendix F) The drop from thirty-eight to thirty-two juveniles on death row is a 16% decrease in just over three years, a period in which there was a

47% increase (from 1,251 to 1,842) in the adult death row population.[8]

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[8] Jury sentencing patterns appear to reflect public opinion. According to a number of scientific surveys, public opinion opposes execution of juvenile offenders, although it quite strongly supports capital punishment in general. This pattern has existed for some time. In November 1936, a survey showed 61% in favor of capital punishment. 54% opposed the execution of offenders under the age of 21. H. Cantril, *Public Opinion: 1935-1946* (1951). In February 1965, a similar pattern was found by the Gallup Poll: 45% favored capital punishment, but only 23% favored death sentences for persons under the age of twenty-one. Erskine, *The Polls: Capital Punishment*, 34 Pub. Opinion Q. 290 (1970), *cited in* Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 Stan. L.Rev. 1245, 1250 (1974).

A university research center conducted a telephone poll throughout Georgia in the fall of 1986. Of the 917 Georgians interviewed, 75% favored capital punishment, but only 26% favored death sentences for crimes committed under age eighteen. Thomas & Hutcheson, Georgia Residents' Attitudes Toward the Death Penalty, the Disposition of Juvenile Offenders, and Related Issues (December 1986) (unpublished report prepared for the Clearinghouse on Georgia Prisons and Jails by the Center for Public and Urban Research, Georgia State University).

A telephone survey of 509 respondents was conducted across the entire state of Connecticut in May, 1986, with similar results. While 68% favored capital punishment in general, only 31% favored it for crimes committed while under age eighteen. Tuckel & Greenberg, Capital Punishment in Connecticut (May 1986) (unpublished report prepared for the Archdiocese of Hartford by The Analysis Group, Inc., New Haven, Connecticut).

If public opinion is an objective indicator of society's standards of decency, then it is clear that the moral consensus supporting capital punishment in general does not extend to the execution of children and adolescents.

C. Execution Of *This* Person For A Crime Committed At Age Fifteen Would Be Cruel And Unusual Punishment Because The Oklahoma Courts Failed To Give Careful, Particularized Consideration To The Character And Background Of The Accused Boy.

Although the Constitution does not deny government the power to take the lives of those who have committed the most serious of crimes, the supreme law of the land does require care, restraint, fairness and decency in the infliction of the most severe of punishments. The death penalty is special and unique—qualitatively different from all other governmental powers. *Spaziano* v. *Florida*, 468 U.S. at 468-69 (Stevens, J., dissenting). It is irrevocable: Mistakes cannot be rectified. In a case upholding defendants' convictions and death sentences, Justice Robert Jackson alluded to the law's traditional reluctance and restraint:

> When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance.

Stein v. *New York*, 346 U.S. 156, 196 (1953). There is even greater reason for giving the condemned the benefit of all doubts when the condemned was a fifteen year old boy at the time of the crime.

Even if this Court rules that imposing a death sentence on an adolescent is not invariably cruel and unusual punishment, the execution of Wayne Thompson would still violate the Eighth Amendment on narrow grounds: The courts of Oklahoma failed to assess adequately the fundamental justice of the death penalty in this case because the courts did not give careful, particularized consideration to the boy's youth and moral culpability as required by the Constitution.

Throughout this case, the logic of the Oklahoma courts has been simple. The boy was certified to stand trial as if he were an adult. If he may be tried as if he were an adult, he may be punished as if he were an adult. If adults may be put to death, he may be put to death. This logic, of course, would be equally

applicable to any child certified to stand trial as if he or she were an adult, whether the child was, for example, nine, twelve or, as the boy in this case, fifteen.

This abstract syllogism ignored the command of the Eighth Amendment that a death sentence must "reflect a reasoned moral response to the defendant's background, character and crime." *California* v. *Brown*, 107 S.Ct. at 841 (O'Connor, J., concurring); yet, it is the only articulated basis for the decision of the Court of Criminal Appeals that the execution of the defendant would not be cruel and unusual punishment. 724 P.2d at 784. Tragically, the appellate court's cursory analysis does illustrate how the trial court arrived at the decision to sentence the defendant to death. Oklahoma courts never reviewed this case in light of this Court's insistence that age bears directly on the fundamental justice of the death penalty. *Skipper* v. *South Carolina*, ___ U.S. ___, 106 S.Ct. 1669, 1676 (1986) (Powell J., joined by Burger, C.J. and Rehnquist, J., concurring). *See also Eddings* v. *Oklahoma*, 455 U.S. 104 (1982).

1. The Trial Court Decided To Hold Defendant Accountable Not Because He Was An Adult, But As If He Were An Adult. The Trial Court's Certification, However, Is Not Constitutionally Sufficient Consideration Of Age As A Mitigating Factor.

When the jury experienced some uncertainty or confusion about Wayne Thompson's youth, they asked: "Has the Defendant been certified as an adult?" The trial court answered simply, "yes." This answer was incorrect. It misled the jury into believing that the issue of the defendant's adulthood, his maturity, and his personal culpability had already been determined. Yet, as a matter of Oklahoma law, the defendant had not been adjudged to be an adult. He was "certified" to stand trial "as if he were an adult." 10 Okla. Stat. § 1112(b).

More to the point, during certification proceedings, the boy had not been adjudged to be as responsible or as morally culpable as an adult. Instead, the trial court decided, first, that

he was old enough to appreciate the wrongfulness of his actions and, second, that the prospects for rehabilitation within the juvenile system were low. [JA 5-8] Indeed, the "amenability" inquiry required by 10 Okla. Stat. § 1112(b) is more a prediction about the capacities of Oklahoma's juvenile justice system than it is an assessment of the defendant's moral guilt. The trial judge who certified the defendant wrote:

> The witnesses from the Department of Human Services could offer no possible placement within the Department with any services that hold out any reasonable prospect for rehabilitation of this juvenile. The best the Department could do for this juvenile would be to warehouse him until he was 18.

[JA 7] Although such considerations are relevant to a decision whether to waive juvenile court jurisdiction, as the Court of Criminal Appeals held in Eddings' case, *In the Matter of M.E.*, 584 P.2d 1340, 1346 (Okla. Cr. 1978), *cert. denied*, 436 U.S. 921 (1978), such predictions do not bear directly on the fundamental justice of the death penalty.

The issues of his emotional maturity, his personal moral culpability for the murder, and the propriety of the death penalty were not before the court at the time of certification. Having determined that the boy passed Oklahoma's test of sanity and that the murder was premeditated, the certifying court did not examine the boy's personal culpability or "moral guilt," *Enmund* v. *Florida*, 458 U.S. at 801, for the murder of Charles Keene. The court explored *none* of the issues constitutionally relevant to the personal culpability of this fifteen year old child: What actions were attributable solely to the boy? Why did he participate in the killing? What influence did others, including co-perpetrators and family, have on his participation in the killing? And did he appreciate the wrongfulness of killing Charles Keene (rather than simply the wrongfulness of killing in general)? Plainly, the decision to try the boy in adult criminal court was not—and was not intended to be—a judgment on his moral culpability for purposes of inflicting the supreme penalty. *See Tison* v. *Arizona*, *supra*.

2. The Trial Judge Failed To Instruct The Jury That It Must Consider Defendant's Youth As A Relevant Mitigating Factor Of Great Weight.

Despite the warning of this Court in *Eddings* v. *Oklahoma* that "the chronological age of a minor is itself a relevant mitigating factor of great weight," 455 U.S. at 116, Oklahoma has not changed its statutes to include age as a mitigating factor. Moreover, it has not even developed the practice of requiring the jury to consider youth as a mitigating factor.

In this case, the trial court instructed the jury, erroneously, that the boy was an adult. The trial judge failed to instruct the jury that his youth *must* be considered in mitigation. Worse, the instructions indicated that the jury need *not* consider youth as mitigating: "*The determination of what are mitigating circumstances is for you as jurors to resolve* under the facts and circumstances of this case." [JA 23] (emphasis added)[9]

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[9] In addition, from the outset of the trial, the prosecutor, with the tacit approval of the trial judge, discouraged consideration of the boy's youth. Throughout the jury selection process the prosecutor treated the defendant's youth as a factor that should not be considered. He was not always careful to specify that age was irrelevant only to the issue of guilt. Repeatedly the prosecutor asked jurors about this issue: "I'm asking you to think right now about your objectivity in regard to Mr. Thompson's age if it's going to be something that is going to interfere with your deliberation in this case." [Tr. 63] Asking every juror the age of his or her children, the prosecutor sent a message that the jury should not be sympathetic to the boy, and that they might be if their children were as young as he. [Tr. 80] Over and over, in front of the whole venire, the prosecutor asked these questions and made these comments. *See* Tr. 88, 91-92, 100, 103, 106-07, 223-25, 234-35, 265-66, 277-78. At one point the judge actively joined in this questioning. *See* Tr. 205. Through this process, the jurors were conditioned to believe that they should not consider the youthfulness of Wayne Thompson. Even though defense counsel emphasized the boy's youth throughout the jury selection process and the trial, the defense did not disrupt this conditioning process. Defense counsel did not object to the prosecutor's voir dire. Under these circumstances the jury could reasonably have believed that the

In effect, the jury was misinformed that it had complete discretion as to what factors are mitigating. The trial judge did state that evidence had been offered with regard to petitioner's youth as a mitigating factor. [JA 24] However, even with such a reminder, the trial court's instructions were poor compliance with the ruling of *Eddings* that youth is a relevant mitigating factor of great weight. In an apparent effort to resolve its confusion, the jury returned a question asking the judge to define "mitigating." The judge's response was short and unhelpful: "You have your instructions, please continue deliberation." Supplemental Instruction No. 12. [JA 28]

Having been told by the prosecutor, with the apparent approval of the court, that the boy's youth should not "interfere with [the jurors' deliberations] in this case," [Tr. 63] and having been told incorrectly by the court that the boy had been "certified as an adult," the jury reasonably could have believed under the court's instructions that it was their duty, in "determin[ing] . . . what are mitigating circumstances," to reject youth as a mitigating circumstance. *Cf. Sandstrom* v. *Montana*, 442 U.S. 510, 518 n. 7 (1979).

3. The Eighth Amendment Requires That A Sentencing Court Give Careful, Particularized Consideration To The Character And Background Of The Defendant In Order To Assess The Fundamental Justice Of The Death Penalty. This Principle Mandates That No Child Be Sentenced To Die Unless The Sentencing Court Finds That The Child Is Morally Culpable To The Same Degree As An Adult And That The Child Is Beyond All Hope Of Rehabilitation.

The unique characteristics of capital punishment demand procedural safeguards in the "particularized consideration of relevant aspects of the character and record of each convicted defendant." *Woodson* v. *North Carolina*, 428 U.S. at 303 (plu-

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prosecutor's directions were those that must be followed. *See Plunkett* v. *Estelle*, 709 F.2d 1004, 1009-10 (5th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

rality opinion). Ultimately, the infliction of death can only be understood as a community's judgment "that an individual has lost his moral entitlement to live." *Spaziano*, 468 U.S. at 469 (Stevens, J., dissenting). When applied to a child of fifteen years, a death sentence must be understood as a decision that the condemned has lost his moral entitlement to grow. The deliberate killing of a human being by the state "is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice." *Furman* v. *Georgia*, 408 U.S. at 306 (Stewart, J., concurring).

Even the decisions of state courts that uphold juvenile executions, if due process is strictly observed, discuss the need for great care in reviewing such cases. This judicially-imposed restraint prevails because, in the words of the Mississippi Supreme Court, it is "deeply disturbing that the life of a youth should be taken in punishment for his crime." *Tokman* v. *State*, 435 So.2d 664, 672 (Miss. 1983), *cert. denied*, 467 U.S. 1256 (1984) (youth's death sentence upheld because of several aggravating circumstances and no mitigating circumstances in addition to age).

The factor of youth must trigger a heightened scrutiny of both the sentencing process and the fundamental justice of the penalty in a particular case. Oklahoma is almost alone in its insistence that there is nothing special about a capital case in which a juvenile is certified to stand trial as though he were an adult.

In *Commonwealth* v. *Green*, 151 A.2d 241 (Pa. 1959), the Supreme Court of Pennsylvania held that age alone did not justify life imprisonment rather than a death sentence. However, in language that is most instructive in evaluating Oklahoma's treatment of the defendant in this case, the court also stated:

> [The defendant's] age [of fifteen] is an important factor in determining the appropriateness of [a death penalty imposed for murder] and should impose upon the sentencing court the duty to be ultra-vigilant in its inquiry into the make-up of the convicted murderer. That youthful age is

an important factor is graphically illustrated by the fact, that so far as our research can ascertain, no person under the age of 16 years and only one person under the age of 19 years has ever suffered the death penalty in this Commonwealth.

* * *

To what extent, if any did the court below measure the understanding and judgment of this 15 year old boy? . . . Beyond his age, the manner of the crime and his I.Q. rating the court below—unless the record contains grave omissions—knew nothing and made no inquiries to determine the background of this boy or what made him "tick." To the possible argument that [the defendant] could have but did not present such evidence, the answer is clear: when a court sits in judgment to determine whether a 15 year old boy who has committed an atrocious crime shall die in the electric chair it is the duty of the court to inquire and to exhaust every avenue of information that would inform it of the type of individual represented by that boy. Both the criminal act and the criminal himself must be thoroughly, completely and exhaustively examined before a court can exercise a sound discretion in determining the appropriate penalty.

* * *

It is manifest from this record that two factors only led to the imposition of the death penalty—the manner of the murder and the placation of . . . the public plaint. The court below in determining the appropriate penalty considered the criminal act, but not the criminal himself and in so doing committed an abuse of discretion.

151 A.2d at 246-47 (emphasis deleted).

In the case at bar, as in *Green*, and despite *Eddings*, the state seeks to inflict death on a boy for a crime committed at age fifteen, even though: (i) there is utterly nothing in the record to suggest that the death sentence is based on the individual characteristics and background of the defendant; (ii) the sole basis for the death sentence appears to be the jury's horror at the manner of the killing (without regard to extenuating motives); and, most important, (iii) the verdict and judgments of the Oklahoma courts in this case reflect a will to inflict death

just as if the crime had been committed by an adult, without any meaningful assurance that jury, trial court or appellate court looked at this child defendant in a way different than an adult accused of murder. The collective judgment of the Oklahoma courts does not come to grips with two basic principles: First, youth bears directly on the fundamental justice of the death penalty, *Skipper* v. *South Carolina*, 106 S.Ct. at 1676 (Powell, J., concurring); and second, that the youth of the defendant requires more careful and sensitive consideration of the defendant's prospects for rehabilitation.[10]

This Court should insist that no child or adolescent should be sentenced to die unless a jury finds—beyond reasonable doubt—that the child is "both culpable and responsible in the superlative degree," *Ridge* v. *State*, 229 P. 649, 650 (Okl. Cr. 1924), "absolutely incorrigible," *State* v. *Telsee*, 425 So.2d 1251, 1258 (La. 1983), and a continuing threat to society.[11] This test would make it clear that, in such cases as this, the sentence of death cannot rest merely on the nature of the crime—however brutal. It must also fit the character and "moral guilt" of the

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[10] *Cf. State* v. *Valencia*, 132 Ariz. 248, 645 P.2d 239, 242 (1982) ("the age of the defendant, 16 at the time of both crimes, is 'sufficiently substantial' to call for life imprisonment instead of death."); *State* v. *Maloney*, 105 Ariz. 348, 464 P.2d 793, 803 (1970) ("[W]e feel compelled . . . because defendant was only 15 years of age at the time he killed, to also carefully examine the propriety of the ultimate penalty here. . . ."), *cert. denied*, 400 U.S. 841 (1970); *State* v. *Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977) (sixteen year old's death sentence reduced to life because of his age and background); *People* v. *Davis*, 29 Cal.3d 814, 633 P.2d 186 (1981) (life imprisonment without parole should not be imposed on offenders below the age of eighteen); *State* v. *Telsee*, 425 So.2d 1251, 1258 (La. 1983) (forty year imprisonment for rape was unconstitutionally excessive, absent a finding that a seventeen year old was "absolutely incorrigible").

[11] Despite strenuous efforts by the prosecuting attorney in this case, the jury did not find that the defendant would commit more violent acts. [JA 30] Thus, the execution of *this* defendant cannot be justified as necessary for incapacitation or specific deterrence.

defendant as carefully assessed through an indisputably reliable sentencing proceeding. *See Zant* v. *Stephens*, 462 U.S. 862, 888 (1983); *Woodson* v. *North Carolina*, *supra*.

This is an offense by a juvenile—acting with three adults, including an older brother—who wrongly believed that he should take the law into his own hands by murdering the man who had been beating his sister.[12]

As the prosecuting attorney argued without irony or appreciation of *Eddings*' nearly identical language, the defendant on trial "was not a normal sixteen year old." *Eddings* v. *Oklahoma*, 455 U.S. at 116; *compare id. with* the prosecutor's closing argument at Tr. 865. Like Eddings, Thompson was a juvenile who experienced serious emotional and behavioral problems. Even Dr. Klein's handwritten psychological report refers to the defendant's history of substance abuse and to past beatings of the defendant perpetrated by the victim-to-be. Dr. Klein's report also provides a good description of the defendant's immaturity as reflected in the fact that "Wayne does not have enough ego to handle or to control his impulses. . . ." [R. 491]

Like Eddings, Thompson was abused. Indeed, in this case, the defendant suffered from a habit of paint sniffing induced by the man the defendant later killed, from beatings at the hands of the same man, and from the emotional turmoil of violent family conflict caused in part by the same man. When assessing the fundamental justice of the death sentence, it must not be forgotten that the defendant's crime was against a family mem-

[12] The record reflects the likelihood that the Thompson-Mann family's anger played an important role in the murder. A child or adolescent who kills a family member may be responding, consciously or unconsciously, to perceived family wishes. Sargent, *Children Who Kill: A Family Conspiracy*, 7 Social Work 35 (1962).

ber in a dispute arising from extended, tragic, violent family conflict.[13]

The state of Oklahoma used evidence of defendant's background—and particularly the psychological report—only to conclude that he knew the difference between right and wrong—or that he should have known. On this basis, the state court concluded that the defendant should be tried as if he were an adult. The state then bootstrapped from this decision to waive juvenile jurisdiction to the conclusion that he ought to die for the crime of murder. 724 P.2d at 784. This conclusion denies the relevance of age and the youth's vulnerability to these circumstances, and thus ignores the weight of precedent, tradition, and considerations of justice. It virtually repeats Oklahoma's error in *Eddings*, in which the Oklahoma Court of Criminal Appeals "considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability." 455 U.S. at 113.

The imposition of the death penalty cannot, on the facts of this case, be allowed to stand. Even if the Court does not decide that imposition of the death penalty against a person who was fifteen years old at the time of his offense is unconstitutional per se, this particular death sentence must be struck down as a violation of the Eighth Amendment.

[13] Thompson was guilty of murder in the first degree, but his crime was not of the type that has prompted recent national concern about juvenile violence. *See, e.g., Eddings* v. *Oklahoma*, 455 U.S. at 116, citing National Advisory Committee on Criminal Justice Standards and Goals, *Task Force Report on Juvenile Justice and Delinquency Prevention* 3 (1976). The record is clear that Thompson's crime was not of "the most reprehensible classes of homicide known to the law," as defined in *Ridge* v. *State*, 229 P.2d at 650, when "one takes the life of another against whom he has no grievance, for the purpose of robbery, rape, or personal gain." And yet the jury, influenced by gruesome photographs that a zealous prosecutor used skillfully, condemned Thompson to death on the basis of one finding—that the crime was especially heinous, cruel or atrocious.

II

THE RELIABILITY OF THE SENTENCING PROCESS IN THIS CASE WAS UNDERMINED BY THE ADMISSION OF HIGHLY INFLAMMATORY EVIDENCE THAT PREJUDICED THE DEFENDANT'S RIGHT TO FAIR, FULL JURY CONSIDERATION OF ALL MITIGATING CIRCUMSTANCES, INCLUDING AGE.

A. The Prosecution Deliberately Used Inflammatory Evidence And Arguments To Convince The Jury Not To Weigh Defendant's Age As A Mitigating Circumstance.

In this case, the trial court admitted evidence described by the Oklahoma Court of Criminal Appeals as "gruesome," "ghastly," and "of little probative value." 724 P.2d at 782-83. The evidence at issue, admitted over the objection of trial counsel, consisted of two color photographs of the victim's body. The photographs were taken after the recovery of the body from the Washita River, where it had been for almost one month. 724 P.2d at 782. The appellate court had particularly harsh words for the prosecutor who offered the evidence: "We do not understand why an experienced prosecutor would risk reversal of the whole case by introducing such ghastly, color photographs with so little probative value." *Id.* Of course, the Court of Criminal Appeals did understand that "[a]dmitting them into evidence served no purpose other than to inflame the jury." *Id.* Nevertheless, the court upheld the judgment and sentence. The admission of the prejudicial evidence was deemed harmless error because evidence of the boy's guilt was strong. *Id.* at 783.

The appellate court did not state specifically that it would have been error to admit the photographs in the penalty phase of the trial, but such a conclusion is clearly warranted. Under Oklahoma law, the same rules apply to the admissibility of evidence in the sentencing phase of a trial as in the guilt phase. 12 Okla. Stat. §2103. "In cases where the photographs in question depict a gruesome scene, the trial court must consider whether the probative value of the particular photograph outweighs the prejudice potentially accompanying its admission

. . ." *Cooper* v. *State*, 661 P.2d 905, 907 (Okl.Cr. 1983). The court already made an extremely strong finding as to prejudice and found little probative value with regard to guilt.

This unequivocal finding of prejudice must carry over to the penalty phase. Furthermore, the balance between probativeness and prejudice should remain the same. Admittedly, certain information may be probative for the penalty phase that would not be probative in the guilt phase. In particular, since one of Oklahoma's statutory aggravating circumstances for invoking the death penalty is that "[t]he murder was especially heinous, atrocious, or cruel," evidence speaking to that factor would be probative in the penalty phase. In this case, however, there was already evidence, in the form of defendant's statements to two witnesses and the medical examiner's report, that fully addressed the question of the manner of the killing. *See State* v. *Poe*, 441 P.2d 512 (Utah 1968) (abuse of discretion to admit color slides of autopsy when all facts already presented by medical and lay testimony). Even if the photographs of the victim's remains were minimally probative, they were merely cumulative. "[W]hen the photos are merely cumulative . . ., that fact must enter into the probative/prejudice balance." *Tobler* v. *State*, 688 P.2d 350, 356 (Okl.Cr. 1984).

The admission of the photographs, even in the penalty phase, was error. Indeed, these gruesome, inflammatory photographs were even more prejudicial in relation to capital sentencing procedure. These gruesome photographs concentrated the attention of the jury on the effects of post-mortem decomposition rather than the circumstances of the murder. Here, the photographs depicted not only the effect of the killing but also the effect of almost one month's immersion in the Washita River. No juror could help but have his or her attention diverted from the real issue of the defendant's moral guilt.

The error was compounded by the prosecutor's remarks during the penalty phase. His conduct and tactics were not subtle. In closing argument, the prosecutor used the inflammatory evidence to distract the jury from what he described as "the problem": "[W]hat to do with a guilty person who has

killed somebody else that is sixteen years old." [Tr 849] The admission of the prejudicial evidence and the repeated emphasis on that evidence, coupled with the prosecutor's remarks, made it extremely unlikely that the jury treated petitioner's youth as a mitigating factor of great weight. Not only were the gruesome photographs likely to distract the jury's attention from any mitigating circumstances, the prosecutor specifically used the photographs in an attempt to prevent the jury from considering petitioner's youth in mitigation. The prosecutor repeatedly tried to deny the defendant's youth by arguing that he was an adolescent only in years. *Id.* After using the inflammatory photographs, photographs that "served no purpose other than to inflame the jury," 724 P.2d at 782, during a detailed and graphic description of the crime, the prosecutor climaxed his argument: "Its not the sixteen year old, folks, that can do that." [Tr. 865]

The prosecutor's comments were an obvious and successful attempt to subvert this Court's command that the age "of a minor is itself a relevant mitigating factor of great weight." *Eddings*, 455 U.S. at 116. The jury recommended the death sentence on the sole basis of one statutory aggravating factor—that the murder was especially heinous, cruel and atrocious. [Tr. 870] The admission of the photographs "served no purpose other than to inflame the jury." 724 P.2d at 782. Thus, it was far more likely that the jury would decide to inflict death despite defendant's age. Moreover, even with this inflammatory evidence, the jury had great difficulty in reaching its conclusion that the aggravating circumstance was present, as shown by the jury's request for further instruction on mitigation and on the availability of parole if the death penalty were not imposed. *See* Supplemental Instructions Nos. 12 and 13. [JA at 28-29] In this context, while any error with regard to guilt or innocence may have been harmless, the error in the penalty phase was not harmless.

B. Trial Court Errors Prejudicing Jury Deliberations Over The Death Penalty Are Constitutional Errors. They Cannot Be Disregarded As Merely Harmless.

Imposition of the death penalty is excessive, severe, cruel and unusual if it is not based on a careful moral inquiry into the

culpability of the accused. The punishment must not only fit the crime, it must fit the accused. *See Lockett* v. *Ohio*, 438 U.S. 586 (1978); *Woodson* v. *North Carolina*, *supra*; *Roberts* v. *Louisiana*, 431 U.S. 633, 637 (1977). The jury's role in assessing the fairness of the most severe of penalties requires full, fair, careful consideration of all mitigating circumstances—without passion or prejudice.

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. This emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence. As this Court observed in *Eddings*, the common law has struggled with the problem of developing a capital punishment system that is "sensible to the uniqueness of the individual." . . . *Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. *Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion.*

California v. *Brown*, 107 S.Ct. at 841 (O'Connor, J., concurring) (emphasis added). This Court has stressed that the "'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.'" *Zant* v. *Stephens*, 462 U.S. at 888 (quoting *Lockett* v. *Ohio*, 438 U.S. at 604 (plurality opinion of Burger, C.J.)).

This Court must not rely on some speculative possibility that the jury might still have decided to sentence a fifteen year old defendant to die without the prejudicial evidence. Such a conclusion would be particularly unwarranted in this case, where the jury had difficulty in imposing the death penalty despite the prejudicial evidence.

If this Court views this case as a whole, the totality of the trial court's constitutional errors in this case—its improper jury instructions, its tolerance of the prosecutor's warning to jurors not to let the boy's youth "interfere" with deliberations,

its admission of inflammatory evidence, and its tolerance for the prosecutor's use of the photographs—undermined the reliability of the sentencing procedure. *Caldwell* v. *Mississippi*, 472 U.S. ____, 105 S.Ct. 2633 (1985). Though these errors rendered the sentencing phase of the trial fundamentally unfair, contrary to the state's brief in opposition to the writ of certiorari, the proper test is not "fundamental unfairness." *Caldwell* demonstrates the significance—and the constitutional character—of the errors in this case. Indeed, *Caldwell* is applicable here for the same reasons articulated by this Court when it distinguished the case from *Darden* v. *Wainwright*, ____ U.S. ____, 106 S.Ct. 2464 (1986).

The constitutional errors in this case, like the prosecutor's comments in *Caldwell*, involved evidence, arguments and instructions that created an "intolerable danger" that the jury would misconceive its duty and the law. *Caldwell*, 106 S.Ct. at 2641. Especially in light of the trial court's responsibility for the errors, the prejudicial evidence as used by the prosecutor combined with the erroneous instructions greatly increased the chance that these errors would affect sentencing. Finally, the trial judge's erroneous instruction during the guilt phase of trial that defendant was certified as an adult naturally misled the jury not only as to the facts, but also into believing that its role was far less important than it was. After all, if the defendant was a bona fide, "certified" adult by prior state decision *and* the jury could decide for itself "what is mitigating," the jury could not help but believe that its responsibility for weighing age in a more careful and sensitive way was reduced—even preempted by a prior certification. *Compare Caldwell*, 105 S.Ct. 2641-42 *with Darden*, 106 S.Ct. at 2473 n. 15.

As this Court stated in *Zant* v. *Stephens:*

> "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977). Thus, although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error.

462 U.S. at 885. In this case, the deliberations of the Court of Criminal Appeals did nothing to ensure the reliability of the sentencing procedure. The appellate court was required to decide "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor." 21 Okla. Stat. § 701.13. Though the court did discuss the manner in which the defendant committed this murder, on this critical issue of prejudice and passion, the court did not even consider the effect of the photographs which it had already described as inflammatory and prejudicial.[14]

The cry for retribution against Wayne Thompson was the result of inflamed passions, not a careful assessment of moral guilt. However, the proud tradition of this nation and this Court is to resist excessive passion and to pursue a more reasoned justice under law. Moreover, this tradition is deeply rooted in the framers' hopes for the Bill of Rights. In a letter to Jefferson in Paris, Madison expressed doubts whether the "parchment barriers" of declared rights would be effective in a republic. Jefferson replied that Madison overlooked the legal check that a bill of rights would place in an independent judiciary, which, Jefferson continued, would be unaffected by "the '*civium ardor prava jubentium*' "—a phrase from Horace, "the frenzy of . . . fellow citizens bidding what is wrong." Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *reprinted in Thomas Jefferson: Writings* 942, 943 (M. Petersen ed. 1984); Horace, *Odes* III, 3:1 (C. Bennett trans. 1939). No phrase could better illuminate the need for the judiciary to restrain inflamed cries for the execution of children and adolescents.

[14] At a minimum, the Oklahoma Court of Criminal Appeals must be required to rule on the error involved in the admission of the photographs with regard to the penalty phase. While that court held that the error was harmless with regard to the determination of guilt, it made no holding on the harm caused with regard to the imposition of the death penalty.

III.

TO VINDICATE AMERICAN TRADITIONS OF SPECIAL TREATMENT OF JUVENILE OFFENDERS, THIS COURT MUST PREVENT THE EXECUTION OF PERSONS FOR CRIMES COMMITTED BELOW A SPECIFIED AGE.

Plainly, the issues respecting the admission of prejudicial evidence, along with the other constitutional errors, such as the jury instructions, provide this Court with narrow grounds for reversing the judgment below. However, these facts also illustrate the inadequacy of current protections for juveniles in capital cases.

The case at bar is an excellent example of how the youth of an offender can be lost in the complex, emotional sentencing stage of a capital case. Despite this Court's requirement that chronological age be given great weight as a mitigating factor, present procedures provide no assurance that the state courts will respect this requirement. To justify a retributive death sentence, the prosecution must provoke rage. Although the Court has insisted that careful considerations must be given to youth as a mitigating factor, *see Eddings*, rage, by its nature, makes rational, sensitive, careful assessment of extenuating and mitigating factors difficult if not impossible. "[W]hen a life is at stake, emotionalism often infects the conduct of the trial itself." *State* v. *Maloney*, 105 Ariz. 348, 464 P.2d 793, 803 (1970) (reversing death sentence of fifteen year old convicted of murder.).

At a minimum, this Court should reaffirm and clarify *Eddings* to insist that juries be clearly instructed that youth is a mitigating factor of great weight *and* that an adolescent shall not be condemned to death unless aggravating circumstances plainly outweigh the undeniable, critical mitigating factor of youth. And yet, mere reaffirmation of *Eddings* seems an inadequate response to Oklahoma's continuing disregard for the principles of *Eddings* that the young must be judged more carefully and perhaps punished less harshly than adults. This case illuminates the need for a better standard to protect this

nation's traditions of decent restraint in the punishment of the young.

The only effective means of preventing juvenile executions that are prompted by a prosecutor-induced rage and inadequate state appellate court review—in defiance of this Court's rulings—is an enforceable principle of restraint, such as a minimum age. *See, e.g.*, Greenberg, *Capital Punishment as a System*, 91 Yale L.J. 908 (1982); Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 Ind. L.J. 757 (1986).

When fundamental values such as those secured by the Bill of Rights are at stake, one of the principal challenges of constitutional interpretation is to develop rules that do not "leave the utmost latitude for evasion." *The Federalist No. 84* at 580 (A. Hamilton) (J. Cooke ed. 1961). Although the judicial role is limited by the principles of federalism and democracy, *Gregg* v. *Georgia*, 428 U.S. 153, 174-76 (1976) (opinion of Stewart, Powell and Stevens, J.J.) there is special need and justification for judicial intervention in a case such as this.

First, the prohibition against cruel and unusual punishments cannot be interpreted without careful regard for this nation's traditions and sense of decency. A principle restricting the execution of children and adolescents is rooted in this nation's traditions of juvenile justice and its traditions of decent restraint in the assessment of moral guilt of children. Similar humane traditions accounted for the Eighth Amendment in the first place. *See generally* Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 Buff. L.Rev. 783 (1975). The Eighth Amendment is one of a few constitutional provisions that seem explicitly to mandate an ongoing search for evolving principles of humanity and decency. *Weems* v. *United States*, 217 U.S. 349, 378 (1910); *Gregg* v. *Georgia*, 428 U.S. at 173 (plurality opinion of Stewart, Powell, and Stevens, J.J.); J. Ely, *Democracy and Distrust* 13-14 (1980). The framers adopted the provision over objections that it was "too indefinite," although even opponents admitted

that "the clause expressed a great deal of humanity." 7 Annals of Cong. 754 (1789) (remarks of Representatives Smith and Livermore), *discussed in Weems* v. *United States*, 217 U.S. at 368-69 and *Furman* v. *Georgia*, 408 U.S. at 243-45, 262-63.

Second, the search for principles of humanity and decency to illuminate the meaning of the Eighth Amendment must be, at least in part, a judicial search. When the Eighth Amendment was proposed as part of the Bill of Rights, it was hoped that "independent tribunals of justice [would] consider themselves in a peculiar manner the guardians of those rights." Address of James Madison to the U.S. House of Representatives (June 8, 1789), *reprinted in* 5 *The Writings of James Madison* 385 (G. Hunt ed. 1904). This nation maintains a distinctive tradition that our courts have special responsibility for reviewing the procedures by which government uses criminal process and legal punishments to enforce the law.

Finally, this special judicial role is designed to protect the role of reason and integrity in government's use of criminal process to enforce law. The courts' "essential quality is detachment, founded on independence." *Gregg* v. *Georgia*, 428 U.S. at 175 (opinion of Stewart, Powell and Stevens, J.J.) (quoting *Dennis* v. *United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring)). This truth not only restrains the courts; it must guide them.

The ban on cruel and unusual punishments implicates not only legislative policy; it is a rule of procedure limiting the means by which government may enforce the law. If our traditions justify special protections for children, they justify effective special protections. In this context, a principle of decent restraint—a minimum age for the application of the death penalty—is not merely a matter of policy. It is a fundamental matter of justice to the individual as defined by our traditions and our sense of humanity.

> It took no violent stretching of democratic theory to suppose an expectation on the part of the people that, in employing the criminal sanction, the political branches would abide the judge's sense of what was mete and decent

> in the way of procedure, just as they abided the discretion of the jury. And, if the supposition concerning popular expectations should prove wrong, then the justification of that judicial function was that criminal procedure . . . raised questions of elemental justice to the individual, not of social policy.

A. Bickel, *The Supreme Court and the Idea of Progress* 32 (1970).

Tragically, past efforts of this Court to ensure respect for the nation's traditions in regard to youthful offenders, *Eddings*, have been disregarded by at least one "state['s] courts . . . charged with the front-line responsibility for the enforcement of constitutional rights." *Gideon* v. *Wainwright*, 372 U.S. 335, 351 (1963) (Harlan, J., concurring). Such disregard "in the long run will do disservice to the federal system." *Id.* Indeed, executions of children and adolescents in the absence of any moral consensus favoring such punishment will erode respect for law and for the retributive goals of capital punishment. "Civilized societies will not tolerate the spectacle of execution of children." American Law Institute, Model Penal Code § 210.6 commentary at 133 (Official Draft and Revised Comments 1980). In this case, a principle of decent restraint will protect our children and adolescents from tragic mistakes caused by the unpredictable effects of rage. It will also protect the nation's traditions of justice for the young.

CONCLUSION

Petitioner respectfully requests that this Court reverse the judgment of the Oklahoma Court of Criminal Appeals insofar as it affirmed the death sentence in this case, vacate the death sentence, and grant such other relief as it deems appropriate.

Respectfully submitted,

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APPENDIX

APPENDIX A

Pertinent Oklahoma Statutes Respecting Definition of "Child" And Trial Of Children As Adults

10 Okla. Stat. § 1101

When used in this title, unless the context otherwise requires:

1. "Child" means any person under eighteen (18) years of age, except for any person sixteen (16) or seventeen (17) years of age who is charged with murder, kidnapping for purposes of extortion, robbery with a dangerous weapon, rape in the first degree, use of a firearm or other offensive weapon while committing a felony, arson in the first degree, burglary with explosives, shooting with intent to kill, manslaughter in the first degree, or nonconsensual sodomy.

Amended by Laws 1982, c. 312, § 13, operative Oct. 1, 1982; Laws 1984, c. 120, § 1, emerg. eff. April 10, 1984.

10 Okla. Stat. § 1104.2

A. Any person sixteen (16) or seventeen (17) years of age who is charged with murder, kidnapping for purposes of extortion, robbery with a dangerous weapon, rape in the second degree, use of firearm or other offensive weapon while committing a felony, arson in the first degree, burglary with explosives, shooting with intent to kill, manslaughter in the first degree, or nonconsensual sodomy, shall be considered as an adult. Upon the arrest and detention, such sixteen- or seventeen-year-old accused shall have all the statutory and constitutional rights and protections of an adult accused of a crime, but shall be detained in a jail cell or ward entirely separate from prisoners who are eighteen (18) years of age or over.

B. Upon the filing of an information against such accused person, a warrant shall be issued which shall set forth the rights of the accused person, and the rights of the parents,

guardian or next friend of the accused person to be present at the preliminary hearing, to have an attorney present and to make application for certification of such accused person as a child to the juvenile division of the district court. The warrant shall be personally served together with a certified copy of the information on the accused person and on the parents, guardian or next friend of the accused person.

C. The accused person shall file a motion for certification as a child before the start of the criminal preliminary hearing. Upon the filing of such motion, the complete juvenile record of the accused shall be made available to the district attorney and the accused person.

At the conclusion of the state's case at the criminal preliminary hearing, the accused person may offer evidence to support the motion for certification as a child.

The court shall rule on the certification motion of the accused person before ruling on whether to bind the accused over for trial. When ruling on the certification motion of the accused person, the court shall give consideration to the following guidelines, listed in order of importance:

1. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;

2. Whether the offense was against persons or property, greater weight being given for retaining the accused person within the adult criminal system for offenses against persons, especially if personal injury resulted;

3. The record and past history of the accused person, including previous contacts with law enforcement agencies and juvenile or criminal courts, prior periods of probation and commitments to juvenile institutions; and

4. The prospects for adequate protection of the public if the accused person is processed through the juvenile system.

The court, in its decision on the certification motion of the accused person, need not detail responses to each of the above

considerations, but shall state that the court has considered each of the guidelines in reaching its decision.

D. Upon completion of the criminal preliminary hearing, if the accused person is certified as a child to the juvenile division of the district court, then all adult court records relative to the accused person and this charge shall be expunged and any mention of the accused person shall be removed from public record.

Laws 1978, c. 231, § 1, eff. Oct. 1, 1978; Laws 1979, c. 257, § 2. [Subsequently Amended by Laws 1985, c. 278, § 1, eff. Nov. 1, 1985; Laws 1986, c. 179, § 2, eff. Nov. 1, 1986]

10 Okla. Stat. § 1112

(a) Except as otherwise provided, a child who is charged with having violated any state statute or municipal ordinance other than those enumerated in Section 1104.2 of this title, shall not be tried in a criminal action but in a juvenile proceeding. If, during the pendency of a criminal or quasi-criminal charge against any person, it shall be ascertained that the person was a child at the time of committing the alleged offense, the district court or municipal court shall transfer the case, together with all the papers, documents and testimony connected therewith, to the juvenile division of the district court. The division making such transfer shall order the child to be taken forthwith to the place of detention designated by the juvenile division, to that division itself, or release such child to the custody of some suitable person to be brought before the juvenile division. However, nothing in this act shall be construed to prevent the exercise of concurrent jurisdiction by another division of the district court or by municipal courts in cases involving children wherein the child is charged with the violation of a state or municipal traffic law or ordinance.

(b) Except as otherwise provided by law, if a child is charged with delinquency as a result of an offense which would be a felony if committed by an adult, the court on its own motion or at the request of the district attorney shall conduct a

preliminary hearing to determine whether or not there is prosecutive merit to the complaint. If the court finds that prosecutive merit exists, it shall continue the hearing for a sufficient period of time to conduct an investigation and further hearing to determine the prospects for reasonable rehabilitation of the child if he should be found to have committed the alleged act or omission.

Consideration shall be given to:

1. The seriousness of the alleged offense to the community, and whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;

2. Whether the offense was against persons or property, greater weight being given to offenses against persons especially if personal injury resulted;

3. The sophistication and maturity of the juvenile and his capability of distinguishing right from wrong as determined by consideration of his psychological evaluation, home, environmental situation, emotional attitude and pattern of living;

4. The record and previous history of the juvenile, including previous contacts with community agencies, law enforcement agencies, schools, juvenile courts and other jurisdictions, prior periods of probation or prior commitments to juvenile institutions;

5. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile if he is found to have committed the alleged offense, by the use of procedures and facilities currently available to the juvenile court; and

6. Whether the offense occurred while the juvenile was escaping or in an escape status from an institution for delinquent children.

After such investigation and hearing, the court may in its discretion proceed with the juvenile proceeding, or it shall state its reasons in writing and shall certify that such child shall

be held accountable for its acts as if he were an adult and shall be held for proper criminal proceedings for the specific offense charged, by any other division of the court which would have trial jurisdiction of such offense if committed by an adult. The juvenile proceeding shall not be dismissed until the criminal proceeding has commenced and if no criminal proceeding has commenced within thirty (30) days of the date of such certification, unless stayed pending appeal, the court shall proceed with the juvenile proceeding and the certification shall lapse.

If not included in the original summons, notice of a hearing to consider whether a child should be certified for trial as an adult shall be given to all persons who are required to be served with a summons at the commencement of a juvenile proceeding, but publication in a newspaper when the address of a person is unknown is not required. The purpose of the hearing shall be clearly stated in the notice.

(c) Prior to the entry of any order of adjudication, any child in custody shall have the same right to be released upon bail as would an adult under the same circumstances.

(d) Any child who has been certified to stand trial as an adult pursuant to any certification procedure provided by law and is subsequently convicted of the alleged offense or against whom the imposition of judgment and sentencing has been deferred shall be tried as an adult in all subsequent criminal prosecutions, and shall not be subject to the jurisdiction of the juvenile court in any further proceedings.

(e) An order either certifying a person as a child pursuant to subsection (b) of this section or denying such certification shall be a final order, appealable when entered.

Laws 1968, c. 282, § 112, eff. Jan. 13, 1969; Laws 1973, c. 227, § 1, emerg. eff. May 24, 1973; Laws 1974, c. 35, § 1; Laws 1974, c. 272, § 2, emerg. eff. May 29, 1974; Laws 1977, c. 79, § 2; Laws 1978, c. 231, § 2, eff. Oct. 1, 1978; Laws 1979, c. 257, § 4; Laws 1981, c. 141, § 1.

PERTINENT OKLAHOMA STATUTES RESPECTING FIRST DEGREE MURDER AND DEATH PENALTY

21 Okla. Stat. § 701.7

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

C. A person commits murder in the first degree when the death of a child results from the injuring, torturing, maiming or using of unreasonable force by said person upon the child pursuant to Section 843 of this title.

Amended by Laws 1982, c. 279, § 1, operative Oct. 1, 1982. Approved May 21, 1982. Emergency. Section 2 of Laws 1982, c. 279 provides for an operative date.

21 Okla. Stat. § 701.9

A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

Laws 1976, 1st Ex.Sess., c. 1, § 3, eff. July 24, 1976.

21 Okla. Stat. § 701.10

Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation.

If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Laws 1976, 1st Ex.Sess., c. 1, § 4, eff. July 24, 1976.

21 Okla. Stat. § 701.11

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding on one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

Laws 1976, 1st Ex.Sess., c. 1, § 5, eff. July 24, 1976.

21 Okla. Stat. § 701.12

Aggravating circumstances shall be:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

2. The defendant knowingly created a great risk of death to more than one person;

3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

4. The murder was especially heinous, atrocious, or cruel;

5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;

7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or

8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty.

Laws 1976, 1st Ex.Sess., c. 1, § 6, eff. July 24, 1976; Laws 1981, c. 147, § 1, emerg. eff. May 8, 1981.

21 Okla. Stat. § 701.13 [as it existed at time of petitioner's crime and trial]

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title

and docket number of the case, the name of the defendant and the name and address of the attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or

2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

Laws 1976, 1st Ex.Sess., c. 1, § 7, eff. July 24, 1976.

21 Okla. Stat. § 701.13 [as amended in 1985]

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The court reporter of the trial court shall prepare all transcripts necessary for appeal within six (6) months of the imposition of the sentence.

The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 701.12 of this title.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court. The defendant shall have one hundred twenty (120) days from the date of receipt by the court of the record, transcript notice, and report provided for

in subsection A of this section, in which to submit a brief. The state shall have sixty (60) days from the date of filing of the defendant's brief to file a reply brief. The defendant may file a reply brief within a time period established by the court, however the receipt of the reply brief, the hearing of oral arguments, and the rendering of a decision by the court all shall be concluded within one (1) year after the date of the filing of the reply brief. If the defendant or the state fails to submit their respective briefs within the period prescribed by law, the defendant or the state shall transmit a written statement of explanation to the Presiding Judge of the Court of Criminal Appeals who shall have the authority to grant an extension of the time to submit briefs, based upon a showing of just cause. Failure to submit briefs in the required time may be punishable as indirect contempt of court.

E. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or

2. Set the sentence aside and remand the case for resentencing by the trial court.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

G. If the court reporter of the trial court fails to complete preparation of the transcripts necessary for appeal within the six-month period required by the provisions of subsection A of this section, the court reporter shall transmit a written statement of explanation of such failure to the Chief Justice of the Oklahoma Supreme Court, the Presiding Judge of the Court of Criminal Appeals, and the Administrative Director of the Courts. The Court of Criminal Appeals shall have the authority to grant an extension of the time for filing the transcripts,

based upon a showing of just cause. Failure to complete the transcripts in the required time may be punishable as indirect contempt of court and except for just cause shown may result in revocation of the license of the court reporter.

Amended by Laws 1985, c. 265, § 1, emerg. eff. July 16, 1985.

Section 2 of Laws 1985, c. 265 provides for severability.

Pertinent Citations To Oklahoma Statutes Establishing Minimum Ages For Adult Rights And Privileges

AGE 16:

Work in Hazardous Occupation (40 Okla. Stat. § 72).
Drive without Parental Consent (47 Okla. Stat. § 6-107).
Stop Attending School (70 Okla. Stat. § 10-105).

AGE 18:

Vote in Elections (Constitution of Oklahoma, Art. 3, sec. 1).
Contract (15 Okla. Stat. § 11).
General Age of Majority (15 Okla. Stat. § 13).
Play Bingo (21 Okla. Stat. § 995.13).
Resort to Pool Halls (21 Okla. Stat. § 1103).
Purchase Cigarettes (21 Okla. Stat. § 1241).
Serve on Juries (38 Okla. Stat. § 18 and § 28).
Marry without Parental Consent (43 Okla. Stat. § 3).
Pawn Property (59 Okla. Stat. § 1511).
Consent to Medical Care (63 Okla. Stat. § 2602).

AGE 21:

Purchase or Consume Beer (37 Okla. Stat. § 241).
Purchase or Consume Liquor (37 Okla. Stat. § 537).

APPENDIX B

PERTINENT STATE STATUTES RESPECTING STATUS OF YOUTH IN DEATH PENALTY STATES

Minimum Age Of Offender Required By Thirty-Six Capital Punishment Jurisdictions

Age at Offense	Total	Jurisdiction
18:	11	California (Cal. Penal Code § 190.5; (Supp. 1985))
		Colorado (Col. Rev. Stat. § 16.11-103 (1985))
		Connecticut (Conn. Gen. Stat. Ann. § 53a-46a(h) (1985))
		Illinois (Ill. Ann. Stat. ch. 38, § 9-1(b) (Supp. 1985))
		Maryland (Md. Code art. 27, Sec. 412(d) (as amended, April 13, 1987))
		Nebraska (Nebr. Rev. Stat. § 28-105.01 (Supp. 1984))
		New Jersey (N.J. Stat. Ann. § 2C: 11-3f (Supp. 1986))
		New Mexico (N.M. Stat. Ann. § 31-18-14(A) (Repl. 1981))
		Ohio (Ohio Rev. Code Ann. § 2929.02(E) (Page 1984))
		Oregon (Ore. Rev. Stat. 161.615 (1985))
		Tennessee (Tenn. Code Ann. § 37-1-134(1) (1984))

Age at Offense	Total	Jurisdiction
17:	3	Georgia (Ga. Code Ann. § 17-9-3 (1982))
		New Hampshire (N.H. Rev. Stat. Ann. § 630.5(ix) (1986))
		Texas (Tex. Penal Code Ann. § 8.07(d) (Vernon Supp. 1987))
16:	2	Indiana (Ind. Code Ann. sec. 31-6-2-4 (signed by Governor on Apr. 6, 1987))
		Nevada (Nev. Rev. Stat. § 176.025 (1979))
15:	2	Louisiana (La. Rev. Stat. Ann. § 13:1570(A)(5) (1983))
		Virginia (Va. Code Ann. § 16.1-269(A) (1982))
14:	7	Alabama (Ala. Code § 12-15-34(a) (1977))
		Arkansas (Ark. Stat. Ann. § 41-617(2) (Supp. 1985))
		Idaho (Idaho Code § 16-1806A(1) (Supp. 1986))
		Kentucky (Ky. Rev. Stat. Ann. § 208E.070(2) (1980))
		Missouri (Mo. Ann. Stat. § 211.071 (Vernon Supp. 1985))
		North Carolina (N.C. Gen. Stat. § 7A-608 (1981))
		Utah (Utah Code Ann. § 78-3a-25(1) (Supp. 1983))
13:	1	Mississippi (Miss. Code Ann. § 43-21-151 (1985))
12:	1	Montana (Mont. Code Ann. § 41-5-206(1)(a) (1985))

Age at Offense	Total	Jurisdiction
No Minimum:	9	Arizona (Ariz. Rev. Stat. Ann. § 13-703(G)(5) (Supp. 1985))
		Delaware (11 Del. Code Ann. § 4209(c) (Repl. 1979))
		Florida (Fla. Stat. Ann. § 921.141(6)(g) (West Supp. 1984))
		Oklahoma (21 Okla. Stat. § 701.01 (West 1983))
		Pennsylvania (Pa. Code Ann. § 6355(e) (1985))
		South Carolina (S.C. Code Ann. § 16-3-20(c)(b)(7) (1985))
		South Dakota (S.D. Codified Laws Ann. 23A-27A-1 (Supp. 1984)).
		Washington (Wash. Rev. Code § 10.95.070(7) (Supp. 1986))
		Wyoming (Wyo. Stat. § 6.2-102(j)(vii) (Repl. 1983))

Minimum Statutory Age For Any Criminal Court Jurisdiction
(12 states)

AGE SIXTEEN:

INDIANA: Ind. Code Ann. § 31-6-2-4 (H.B. 1022, 1987).

AGE FIFTEEN:

LOUISIANA: La. Rev. Stat. Ann. § 13:1570(a)(5) (1983).
VIRGINIA: Va. Code Ann. § 16.1-269(A) (1982).

AGE FOURTEEN:

ALABAMA: Ala. Code § 12-15-34(A) (1977).
ARKANSAS: Ark. Stat. Ann. § 41-617(2) (Supp. 1985).
IDAHO: Idaho Code § 16-1806A(1) (Supp. 1986).
KENTUCKY: Ky. Rev. Stat. Ann. § 208E.070(2) (1980).
MISSOURI: Mo. Ann. Stat. § 211.071 (Supp. 1985).
NORTH CAROLINA: N.C. Gen. Stat. § 7A-608 (1986).
UTAH: Utah Code Ann. § 78-3a-25(1) (Supp. 1985).

AGE THIRTEEN:

MISSISSIPPI: Miss. Code Ann. § 43-21-151 (1985).

AGE TWELVE:

MONTANA: Mont. Code Ann. § 41-5-206(1)(a) (1985).

Statutes Specifically Listing Age Of Offender As Mitigating Factor

(27 states)

ALABAMA: Ala. Code § 13A-5-51(7) (1982).
ARIZONA: Ariz. Rev. Stat. Ann. § 13-703G.5 (Supp. 1986).
ARKANSAS: Ark. Stat. Ann. § 41-1304(4) (Repl. 1977).
CALIFORNIA: Cal. Penal Code § 190.05(h)(9) (Supp. 1987).
COLORADO: Colo. Rev. Stat. § 16-11-103(5)(a) (Supp. 1985).
FLORIDA: Fla. Stat. Ann. § 921.141(6)(g) (Supp. 1985).
INDIANA: Ind. Code Ann. § 35-50-2-9(c)(7) (H.B. 1022, 1987).
KENTUCKY: Ky. Rev. Stat. § 532.025(2)(b)(8) (1984).
LOUISIANA: La. Code Crim. Proc. Ann. art. 905.5(f) (1984).
MARYLAND: Md. Code art. 27, § 413(g)(5) (Supp. 1986).
MISSISSIPPI: Miss. Code Ann. § 99-19-101(6)(g) (Supp. 1986).
MISSOURI: Mo. Rev. Stat. § 565.032(3)(7) (Supp. 1987).
MONTANA: Mont. Code Ann. § 46-18-304(7) (1984).
NEBRASKA: Nebr. Rev. Stat. § 29-2523(2)(d) (1985).
NEVADA: Nev. Rev. Stat. § 200.035(6) (1985).
NEW HAMPSHIRE: N.H. Rev. Stat. Ann. § 630.5(II)(b)(5) (1986).
NEW JERSEY: N.J. Stat. Ann. § 2C:11-3(c)(5)(c) (Supp. 1986).
NEW MEXICO: N.M. Stat. Ann. § 31-20A-6(I) (Supp. 1986).
NORTH CAROLINA: N.C. Gen. Stat. § 15A-2000(f)(7) (1983).
OHIO: Ohio Rev. Code Ann. § 2929.04(B)(4) (1982).
PENNSYLVANIA: Pa. Cons. Stat. Ann. art. 42, § 9711(e)(4) (1982).
SOUTH CAROLINA: S.C. Code Ann. § 16-3-20(c)(b)(7 & 9) (1985).
TENNESSEE: Tenn. Code Ann. § 39-2-203(j)(7) (Repl. 1982).
UTAH: Utah Code Ann. § 76-3-207(2)(e) (Supp. 1983).
VIRGINIA: Va. Code § 19.2-264.4(B)(v) (Repl. 1983).
WASHINGTON: Wash. Rev. Code § 10.95.070(7) (Supp. 1987).
WYOMING: Wyo. Stat. § 6-2-102(j)(vii) (Repl. 1983).

APPENDIX C

JUVENILE AND TOTAL EXECUTIONS IN THE UNITED STATES, BY DECADE, 1900 TO PRESENT

Current as of March 31, 1987

Decade	Total Executions	Juvenile Executions	Percentage
1900-09	1,192	23	1.9%
1910-19	1,039	24	2.3%
1920-29	1,169	27	2.3%
1930-39	1,670	41	2.5%
1940-49	1,288	53	4.1%
1950-59	716	16	2.2%
1960-69	191	3	1.6%
1970-79	3	0	0%
1980-87	67	3	4.5%
Totals:	7,355	190	2.6%

Sources of data: W. Bowers, Legal Homicide 54 (1984); NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. 1 (Mar. 1, 1987); Streib, "The Eighth Amendment and Capital Punishment of Juveniles," 34 Cleve. St. L. Rev. 363, 380 (1986).

APPENDIX D

DEATH SENTENCES FOR JUVENILE OFFENDERS, JANUARY 1, 1982, THROUGH MARCH 31, 1987

Year	Offender's Name	Age at Crime	Race	State	Current Status
1982	Barrow, Lee Roy	17	W	TX	reversed in 1985
	Cannon, Joseph J.	17	W	TX	now on death row
	Carter, Robert A.	17	B	TX	now on death row
	Garrett, Johnny F.	17	W	TX	now on death row
	Johnson, Lawrence	17	B	MD	reversed twice but resentenced to death in 1983 and 1984.
	Lashley, Frederick	17	B	MO	now on death row
	Legare, Andrew	17	W	GA	reversed in 1983; resentenced to death in 1984; reversed in 1986.
	Stanford, Kevin	17	B	KY	now on death row
	Stokes, Freddie	17	B	NC	reversed in 1982; resentenced to death in 1983; reversed in 1987.
	Thompson, Jay	17	W	IN	reversed in 1986
	Trimble, James	17	W	MD	now on death row
1983	Bey, Marko	17	B	NJ	now on death row
	Cannaday, Attina	16	W	MS	reversed in 1984
	Harris, Curtis P.	17	B	TX	reversed in 1986
	Harvey, Frederick	16	B	NV	reversed in 1984
	Hughes, Kevin	16	B	PA	now on death row
	Johnson, Lawrence	17	B	MD	reversed in 1983 but resentenced to death in 1984
	Lynn, Frederick	16	B	AL	reversed in 1985 but resentenced to death in 1986
	Mhoon, James	16	B	MS	reversed in 1985
	Stokes, Freddie	17	B	NC	reversed in 1987

Year	Offender's Name	Age at Crime	Race	State	Current Status
1984	Aulisio, Joseph	15	W	PA	now on death row
	Brown, Leon	15	B	NC	now on death row
	Johnson, Lawrence	17	B	MD	now on death row
	Legare, Andrew	17	W	GA	reversed in 1986
	Patton, Keith	17	B	IN	now on death row
	Thompson, W. W.	15	W	OK	now on death row
1985	Livingston, Jesse	17	B	FL	now on death row
	Morgan, James	16	W	FL	now on death row
	Ward, Ronald	15	B	AR	now on death row
1986	Comeaux, Adam	17	B	LA	now on death row
	Cooper, Paula D.	15	B	IN	now on death row
	LeCroy, Cleo	17	W	FL	now on death row
	Lynn, Frederick	16	B	AL	now on death row
	Sellers, Sean	16	W	OK	now on death row
	Wilkins, Heath	16	W	MO	now on death row
	Williams, Alexander	17	B	BA	now on death row
1987	[none reported]				

APPENDIX E

THIRTY-EIGHT PERSONS ON DEATH ROW AS OF DECEMBER 31, 1983, FOR CRIMES COMMITTED WHILE UNDER AGE EIGHTEEN

State	Prisoner	Age at Time of Offense	Sex	Race
Alabama	Davis, Timothy	17	male	white
	Jackson, Carnel	16	male	black
	Lynn, Frederick	17	male	black
Florida	Magill, Paul	17	male	white
	Morgan, James	16	male	white
	Peavy, Robert	17	male	black
Georgia	Bruger, Christopher	17	male	white
	Buttrum, Janice	17	female	white
	High, Jose	16	male	black
	Legare, Andrew	17	male	white
Indiana	Thompson, Jay	17	male	white
Kentucky	Ice, Todd	15	male	white
	Stanford, Kevin	17	male	black
Louisiana	Prejean, Dalton	17	male	black
Maryland	Johnson, Lawrence	17	male	black
	Trimble, James	17	male	white
Mississippi	Cannady, Attina	16	female	white
	Jones, Larry	17	male	black
	Mhoon, James	16	male	black
	Tokman, George	17	male	white
Missouri	Lashley, Frederick	17	male	black
Nevada	Harvey, Frederick	16	male	unkwn.
New Jersey	Bey, Marko	17	male	black
N. Carolina	Oliver, John	14	male	black
	Stokes, Freddie Lee	17	male	black
Oklahoma	Eddings, Monty	16	male	white

State	Prisoner	Age at Time of Offense	Sex	Race
Pennsylvania	Hughes, Kevin	16	male	black
S. Carolina	Roach, James Terry	17	male	white
Texas	Barrow, Lee Roy	17	male	white
	Battie, Billy	17	male	unkwn.
	Burns, Victor Renay	17	male	black
	Cannon, Joseph John	17	male	white
	Carter, Robert A.	17	male	black
	Garrett, Johnny F.	17	male	white
	Graham, Gary L.	17	male	black
	Harris, Curtis Paul	17	male	black
	Pinkerton, Jay K.	17	male	white
	Rumbaugh, Charles	17	male	white

*Sources of data: NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. (Dec. 20, 1983); Brief for Petitioner at 19a app. E, Eddings v. Oklahoma, 455 U.S. 104 (1982); Streib, "The Eighth Amendment and Capital Punishment of Juveniles," 34 Cleve. St. L. Rev. 363, 385 (1986).

APPENDIX F

THIRTY-TWO PERSONS ON DEATH ROW AS OF MARCH 31, 1987, FOR CRIMES COMMITTED WHILE UNDER AGE EIGHTEEN

State	Prisoner	Age at Time of Offense	Sex	Race
Alabama	Davis, Timothy	17	male	white
	Jackson, Carnel	16	male	black
	Lynn, Frederick	17	male	black
Arkansas	Ward, Donald	15	male	black
Florida	LeCroy, Cleo	17	male	white
	Livingston, Jesse	17	male	black
	Magill, Paul	17	male	white
	Morgan, James A.	16	male	white
Georgia	Burger, Christopher	17	male	white
	Buttrum, Janice	17	female	white
	Williams, Alexander	17	male	black
Indiana	Cooper, Paula R.	15	female	black
	Patton, Keith	17	male	black
Kentucky	Stanford, Kevin	17	male	black
Louisiana	Comeaux, Adam	17	male	black
	Prejean, Dalton	17	male	black
Maryland	Johnson, Lawrence	17	male	black
	Trimble, James	17	male	white
Mississippi	Jones, Larry	17	male	black
	Tokman, George	17	male	white
Missouri	Lashley, Frederick	16	male	black
	Wilkins, Heath	16	male	white
New Jersey	Bey, Marko	17	male	black
N. Carolina	Brown, Leon	15	male	black
Oklahoma	Sellers, Sean	16	male	white
	Thompson, W. Wayne	15	male	white
Pennsylvania	Aulisio, Joseph	15	male	white
	Hughes, Kevin	16	male	black
Texas	Cannon, Joseph John	17	male	white
	Carter, Robert A.	17	male	black
	Garrett, Johnny F.	17	male	white
	Graham, Gary L.	17	male	black

*Sources of data: NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. (Dec. 20, 1983); Brief for Petitioner at 19a app. E, Eddings, v. Oklahoma, 455 U.S. 104 (1982); Streib, "The Eighth Amendment and Capital Punishment of Juveniles," 34 Cleve. St. L. Rev. 363 (1986).

APPENDIX G

ARRESTS AND DEATH SENTENCES FOR WILLFUL CRIMINAL HOMICIDE, BY AGE GROUPS, 1982-1985

All Ages

Year	Total Arrests	Total Death Sentences
1982	18,511	284
1983	18,064	259
1984	13,676	280
1985	15,777	(280 est.)*
TOTAL	66,028	1,103

Under Age 16

Year	Total Arrests	% of Arrests For All Ages	Total Death Sentences	% of Sentences For All Ages
1982	417	2.2%	0	0.0%
1983	368	2.0%	0	0.0%
1984	294	2.1%	3	1.1%
1985	381	2.4%	1	0.4%
TOTAL	1,460	2.2%	4	0.4%

Under Age 18

Year	Total Arrests	% of Arrests For All Ages	Total Death Sentences	% of Sentences For All Ages
1982	1,579	8.5%	11	3.9%
1983	1,345	7.4%	9	3.5%
1984	1,004	7.3%	6	2.1%
1985	1,311	8.3%	3	1.1%
TOTAL	5,239	7.9%	29	2.6%

*estimated (exact data unavailable)

Sources of data: UNITED STATES DEPARTMENT OF JUSTICE, CAPITAL PUNISHMENT 1984 6 (1986); UNITED STATES DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 174 (1985); *id.* at 172 (1984); *id.* at 179 (1983); *id.* at 176 (1982); and Appendix D.